

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 914

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF
PRICE ADMINISTRATION, PETITIONER

vs.

SEMINOLE ROCK & SAND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT

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CHESTER BOWLES VS. SEMINOLE ROCK & SAND CO. 1

1 In the District Court of the United States, Southern
District of Florida, Jacksonville Division

Civil Action File No. 896-M

PRENTISS M. BROWN, AS ADMINISTRATOR OF THE OFFICE OF PRICE
ADMINISTRATION, PLAINTIFF

vs.

SEMINOLE ROCK AND SAND COMPANY, A CORPORATION, DEFENDANT

Order substituting party plaintiff

Filed Jan. 3, 1944

This cause came on to be heard upon motion of Chester Bowles by his counsel for leave to substitute the said Chester Bowles, as Price Administrator of the Office of Price Administration, in the place and stead of Prentiss M. Brown as plaintiff in this action. It has been shown that Prentiss M. Brown has resigned from the Office of Price Administrator of the Office of Price Administration and his resignation has been duly accepted; that the said Chester Bowles was appointed to the office of Price Administrator of the Office of Price Administration by the President of the United States; that said appointment was confirmed by the United States Senate on November 4, 1943, and that the said Chester Bowles entered upon his duties as said Administrator on November 8, 1943, and is now lawfully acting as Price Administrator of the Office of Price Administration.

And it further has been satisfactorily shown to the Court that there is a substantial need for continuing and maintaining this action.

It is therefore ordered and decreed that Chester Bowles, as Administrator of the Office of Price Administration be and he hereby substituted, as plaintiff in this action; in the place and stead of Prentiss M. Brown.

Done and ordered at Miami, Florida, this 3rd day of January 1944.

JOHN W. HOLLAND,
United States District Judge.

In United States District Court

Second amended complaint

Filed Jan. 3, 1944

COUNT 1.

I

Plaintiff, Chester Bowles, is the duly appointed and acting Price Administrator of the Office of Price Administration, having been appointed as such by the President of the United States, under and by virtue of the authority given said President by Section 201 (a) of the Emergency Price Control Act of 1942 (hereinafter sometimes referred to as the Act) and by virtue thereof is authorized and empowered to exercise all the rights, powers, and duties conferred upon him by said Act and to bring this complaint.

II

In the judgment of the Price Administrator, defendant has engaged in acts and practices which constitute violations of Section 4 (a) of the Act in that it has violated the terms and provisions of Maximum Price Regulation No. 188 (7 Fed. Reg. 5872) issued and effective pursuant to Section 2 of the Act, and in full force and effect at the times herein mentioned and as hereinafter pointed out.

III

The Price Administrator brings this action as authorized by Section 205 (a) of the Act to restrain violations of and to enforce compliance with said Act and said Regulation issued as aforesaid.

IV

Jurisdiction of this action is conferred upon the Court by Section 205 (c) of the Act.

V

Defendant, Seminole Rock and Sand Company, is a Florida corporation having its principal place of business in Dade County, Florida, and maintains an office in the Congress Building, Miami, Florida, within the Miami Division of the Southern District of Florida and under the jurisdiction of this Court, and is and has been during all the times mentioned herein, engaged in the business of producing and selling rock and sand.

VI

Under and by virtue of authority conferred upon him by the Emergency Price Control Act of 1942, Leon Henderson, the former duly appointed and acting Price Administrator of the Office of Price Administration, on July 29, 1942, issued Maximum Price Regulation No. 188 (7 Fed. Reg. 5872), which said Regulation, as amended from time to time, is now and has been since August 1, 1942, its effective date, in full force and effect. Maximum Price Regulation No. 188 set maximum prices for sale of rock, sand, and stone, among other commodities.

VII

Section 1499.152 of Maximum Price Regulation No. 188, as issued and effective August 1, 1942, provided in part as follows:

"(a) On and after August 1, 1942, regardless of any contract or other obligation;

"(1) No manufacturer shall sell or deliver any article set forth in Appendix A (§ 1499.166) of this Maximum Price Regulation No. 188 at a price higher than the maximum price permitted by this Maximum Price Regulation No. 188; * * *

Paragraph No. 1, quoted above was by Amendment No. 4 issued January 12, 1943, and effective January 18, 1943 (8 Fed. Reg. —), amended to read and provide as follows:

"(1) No manufacturer of an article set forth in Appendix A (§ 1499.166) of this Maximum Price Regulation No. 188 shall sell or deliver such article at a price higher than the maximum price permitted by this Maximum Price Regulation No. 188; * * *

Under Section 1499.153 of said Regulation it is provided as follows:

"(a) Articles priced in March 1942.—The maximum price for any article which was delivered or offered for delivery in March 1942, by the manufacturer, shall be the highest price charged by the manufacturer during March 1942 (as defined in § 1499.163), for the article."

4 Section 1499.163 gives the following definitions for terms used in said Regulation:

"(1) 'Article' means any building material or consumers' goods set forth in Appendix A (§ 1499.166) which is manufactured or sold as a distinct item.

"(2) 'Highest price charged during March 1942' means

"(i) The highest price which the manufacturer charged to a purchaser of the same class for delivery of the article or material during March 1942; * * *

"(3) 'Manufacturer' means a person operating an establish-

ment which produces, fabricates, finishes, or assembles a building material or consumer's goods."

In Paragraph (2) (i) of the above said section, the word "manufacturer" was by Amendment No. 1 issued and effective October 6, 1942 (7 Fed. Reg. 7967), amended to read "seller."

Paragraph (3) of said section as quoted above was amended by Amendment No. 10 (8 Fed. Reg. 4140) issued March 30, 1943, and effective April 5, 1943, to read as follows:

"(3) 'Manufacturer' means the person who makes the first sale of an article listed in Appendix A (§ 1499.166) of this Regulation after the article has been completed to the point indicated by the terminology of the Appendix."

Appendix A of Maximum Price Regulation No. 188 has included as articles covered by said Regulation, since its effective date, the following commodities: Sand and gravel, crushed stone, and dimension stone.

Plaintiff alleges that the article or commodity manufactured by defendant, described by it as "Miami Native rock," "Stone ballast," "Class A stone ballast," or "ballast," is governed by and subject to the provisions of Maximum Price Regulation No. 188.

VIII

Plaintiff alleges that defendant sold and delivered during March 1942, "Miami Native rock" or "Class A stone ballast" according to specifications of the Seaboard Air Line Railway, L. R. Powell, Jr., and H. W. Anderson, Receivers, which were as follows:

"1. Stone Ballast.—Stone for use in the manufacture of ballast shall break into angular fragments which range with fair uniformity between the maximum and minimum size specified; it shall test high in weight, toughness, wear, and soundness, but low in cementing qualities and will be free from dirt, dust, loam, or rubbish.

"Tests may be made from time to time at the option of the purchaser and shall be made at a testing laboratory selected by the purchaser, but visual inspection and other tests shall be made at quarry prior to shipments as often as considered necessary. Tests for weight, toughness, wear, and soundness shall be in accordance with A. R. E. A. Specifications for Stone Ballast.

"Class 'A' Stone Ballast will range between the size which will in any position pass through a two and one-half (2½) inch ring, and the size which will not pass through a three-quarter (¾) inch ring."

That the highest price charged by defendant in March 1942, for said stone or ballast to the Seaboard Air Line Railway, and

purchasers of the same class as said railway, was 60¢ per ton. Notwithstanding the provisions of Maximum Price Regulation No. 188 defendant on and after May 11, 1942, did sell and deliver stone ballast of the same or similar specification as described above to the Seaboard Air Line Railway and did charge therefor prices in excess of the maximum prices fixed by said Regulations; and that between October 16, 1942, and December 16, 1942, both inclusive, defendant did sell and deliver 25,239.25 tons of said ballast to the Seaboard Air Line Railway, and did charge therefor a price of 85¢ per ton, and between December 11, 1942, and August 28, 1943, both inclusive, defendant did sell and deliver 92,316.15 tons of said ballast to the Seaboard Air Line Railway and did charge therefor a price of \$1.00 per ton; that the charges made for ballast so sold and delivered were in excess of the maximum price permitted to be charged by Maximum Price Regulation No. 188. Plaintiff alleges that such acts and practices as above set out constitute violations of the provisions of the Emergency Price Control Act of 1942 and of the applicable regulation issued pursuant thereto and hereinbefore described.

Affidavit of Cyril P. Arnold in support of said violation is attached hereto as Exhibit "A" and by this reference made a part hereof.

COUNT II

I

Plaintiff here incorporates by reference Paragraphs I, II, IV, V, VI, and VII of Count I of this Complaint and asks that the same be considered as a part hereof.

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II

The Price Administrator brings this action as authorized by Section 205 (e) of the Act and claims treble damages.

III

Section 205 (e) of the Act vests in the Price Administrator the right to bring an action on behalf of the United States within one year after delivery is completed for damages in an amount equal to treble the amount by which the sales prices for stone ballast exceed the lawful maximum price determined in accordance with the provisions of the Act and the regulation issued pursuant thereto, together with costs of the cause. Plaintiff alleges that the sales and deliveries of stone ballast hereinafter described were made to a person for use or consumption in the course of trade or business and the buyer hereinafter named is not entitled to bring suit or action under Section 205 (e) of the Act. All the

sales by defendant of said stone ballast hereinafter described occurred more than six months after January 30, 1942, that the date of the enactment and approval of the Emergency Price Control Act of 1942.

IV

Plaintiff alleges that defendant sold and delivered during March 1942 "Miami Native rock" or "Class A stone ballast" according to specifications of the Seaboard Air Line Railway Company, L. R. Powell, Jr., and H. W. Anderson, Receivers, which were as follows:

"1. Stone Ballast.—Stone for use in the manufacture of ballast shall break into angular fragments which range with fair uniformity between the maximum and minimum size specified; it shall test high in weight, toughness, wear, and soundness, but low in cementing qualities and will be free from dirt, dust, loam, or rubbish.

"Tests may be made from time to time at the option of the purchaser and shall be made at a testing laboratory selected by the purchaser, but visual inspection and other tests shall be made at quarry prior to shipments as often as considered necessary. Tests for weight, toughness, wear, and soundness shall be in accordance with A. R. E. A. Specifications for Stone Ballast.

7. "Class 'A' Stone Ballast will range between the size which will in any position pass through a two and one-half (2½) inch ring, and the size which will not pass through a three-quarter (¾) inch ring."

That the highest price charged by defendant in March 1942, for said stone ballast sold and delivered during said month to the Seaboard Air Line Railway, and purchasers of the same class as said railway, was 60¢ per ton.

Plaintiff alleges that defendant did sell and deliver between October 16, 1942, and December 16, 1942, both inclusive, 25,239.25 tons of "Miami Native rock" or "stone ballast" to the Seaboard Air Line Railway Company, L. R. Powell, Jr. and H. W. Anderson, Receivers, and did charge therefore a price of 85¢ per ton; that between December 11, 1942 and May 28, 1943, both inclusive, defendant did sell and deliver 92,316.16 tons of "Miami Native rock" or "stone ballast" to said Seaboard Air Line Railway and did charge therefor a price of \$1.00 per ton.

Plaintiff alleges that the aggregate amount by which the prices received by the defendant for the above "Miami Native rock" or "stone ballast" exceeded the maximum or ceiling price permitted to be charged by the General Maximum Price Regulation No. 188 equals the sum of \$43,235.73; that treble the amount by which the consideration exceeded the applicable maximum price equals the sum of \$129,707.31.

Wherefore, the premises considered, plaintiff prays:

(1) A preliminary and final injunction enjoining the defendant and its officers, agents, servants, employees, and all persons in active concert or participation therewith, directly or indirectly from selling and delivering "Miami Native rock" or "stone ballast" or any other commodity manufactured and produced by it at prices in excess of those prices established by the General Maximum Price Regulation, as said Regulation now exists or as it may be hereafter amended from time to time, or in violation of any regulation or order issued pursuant to the Act establishing maximum prices for "Miami Native rock" or "stone ballast."

(2) That this Honorable Court enter a judgment in behalf of the plaintiff as Price Administrator of the Office of Price Administration and against the defendant Seminole Rock and Sand Company, a corporation, in the sum of \$129,707.31 and costs of the cause.

(3) That plaintiff have such other and further relief, both general and special, to which he may be entitled.

8 Plaintiff moves the Court for an order setting a time and place for a hearing upon plaintiffs prayer for a preliminary injunction.

PHARES N. HIATT,
Phares N. Hiatt,
*Enforcement Attorney,
Jacksonville District Office,
Office of Price Administration,
Seybold Building, Miami, Florida.*
CLARENCE G. KING,
Clarence G. King,
*Enforcement Attorney,
Jacksonville District Office,
Office of Price Administration,
Barnett Bldg., Jacksonville, Fla.*

C. H. LICHLITER,
C. H. Lichliter,
*District Enforcement Attorney,
Jacksonville District Office,
Office of Price Administration,
Barnett Building, Jacksonville, Florida.*

GEORGE D. PATTERSON, JR.,
George D. Patterson, Jr.,
*Regional Enforcement Attorney,
Office of Price Administration,
Candler Building, Atlanta, Georgia.*

[Duly sworn to by Phares N. Hiatt; jurat omitted in printing.]

Exhibit A to complaint

AFFIDAVIT

STATE OF FLORIDA,

County of Dade, ss:

Before me, an officer duly authorized to administer oaths, personally appeared this day Cyril D. Arnold, who being by me duly sworn, deposes and says:

My name is Cyril D. Arnold and I am now and have for a number of months past been an Assistant Investigator of the Office of Price Administration, Jacksonville District Office, and stationed in Miami, Florida. During the periods July 13, 1943, to July 17, 1943, inclusive, and July 28, 1943, to July 30, 1943, inclusive, I did make an examination of all available records pertaining to the sale of ballast rock by Seminole Rock and Sand Company to the Seaboard Air Line Railway Company for the period March 1, 1942, to May 28, 1943, inclusive. In this examination I did examine records on file in the Purchasing Department of the Seaboard Air Line Railway Company, Seaboard Building, Norfolk, Virginia, and in the Auditing Department of said railway at the Seaboard Building, Portsmouth, Virginia. The purchase orders issued by the Seaboard Air Line Railway Company to Seminole Rock and Sand Company, and invoices issued by Seminole Rock and Sand Company showed that between October 16, 1942, and December 16, 1942, inclusive, Seminole Rock and Sand Company did sell and deliver to the Seaboard Air Line Railway Company 25,239.25 tons of "Miami Native rock" or "stone ballast" and did charge and receive therefor a price of 85¢ per ton; that between December 11, 1942, and May 28, 1943, inclusive, Seminole Rock and Sand Company did sell and deliver 92,316.15 tons of "Miami Native rock" or "stone ballast" to said Seaboard Air Line Railway Company and did charge and receive therefor a price of \$1.00 per ton.

On April 14, 1943, I made an examination of all sales invoices in the files of the Seminole Rock and Sand Company for the month of March 1942. I found among said files only two invoices showing sales of ballast during March 1942 to a person other than the Seaboard Air Line Railway Company. All other sales showed sales of stone ballast to the railway company. The sales invoices other than those showing sales to the railway company consisted of two invoices covering sale of 16 cubic yards of stone ballast to Joe J. Brown, Miami, Florida, an individual, at a price of 75 cents per cubic yard f. o. b. plant. The invoices showed the sale of stone ballast sold and delivered to the Seaboard Air Line Railway Company in March 1942, to be at a price

of 60 cents per net ton f. o. b. Seaboard Air Line Railway tracks and was the highest price charged for stone ballast.

CYRIL D. ARNOLD,
Cyril D. Arnold,
Assistant Investigator,
Office of Price Administration.

Sworn to and subscribed before me this 3rd day of January 1944.

WILLIAM E. PERKINS,
Assistant Investigator,
Office of Price Administration.

CONSENT

The undersigned attorneys for defendant, Seminole Rock and Sand Company hereby consent to the Amendment by plaintiff of the Complaint filed in this cause.

Signed this 3rd day of January 1944.

LOFTIN, CALKINS, ANDERSON, SCOTT & PRESTON,
Loftin, Calkins, Anderson, Scott & Preston,
Attorneys for the defendant.

In United States District Court

Answer

Filed Jan. 31, 1944

FIRST DEFENSE

The Second Amended Complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

As to Count I

I

Defendant admits that Chester Bowles is the Price Administrator of the Office of Price Administration, but denies, as hereinafter more specifically set out, that he is authorized to bring this complaint.

The defendant denies that it has engaged in acts and practices which constitute violations of Section 4 (a) of the Emergency Price Control Act of 1942 and that it has violated the

terms and provisions of Maximum Price Regulation No. 188 (7 Federal Register 5872) and says that it could not have been the judgment of the Price Administrator that the defendant had violated such regulations when the Complaint herein was filed, because the original Complaint showed on its face that the plaintiff did not know whether the defendant had violated the General Maximum Price Regulation or Price Regulation No. 188 and he asked the Court to determine which regulation the alleged acts of the defendant violated; and thereafter the plaintiff apparently concluded that the alleged acts of the defendant violated the General Maximum Price Regulation (7 Federal Register 3152) and amended his complaint and charged the defendant in his amended complaint with the violation of the General Maximum Price Regulation only and made no reference whatsoever to the supposed violation of Maximum Price Regulation No. 188, as contained in the original Complaint, but eliminated all reference thereto; and before the defendant was required under orders of this Court to plead to the Amended Complaint charging the violation of the General Maximum Price Regulation, the plaintiff filed his Second Amended Complaint in which he charged the defendant with the violation of Maximum Price Regulation No. 188 and eliminated all reference to the General Maximum Price Regulation. That in each of such Complaints the plaintiff set out the identical acts on the part of the defendant as constituting alleged violations of the law: first, of which regulation the plaintiff did not know; second, of the General Maximum Price Regulation; and third, Maximum Price Regulation No. 188, and therefore the Price Administrator could not have had an informed judgment that the defendant had violated the Act or any lawful regulation made thereunder, and if the Price Administrator did not know which of his regulations, if any, the defendant had violated, certainly the defendant could not be expected to know that fact, if it be a fact.

III

That defendant denies that Section 205 (a) of the Act (Title 50, § 925 U. S. Code) authorizes the bringing of this action on the basis of the facts alleged in the Second Amended Complaint, or otherwise.

The defendant denies that jurisdiction of this Act is conferred upon the Court by Section 205 (c) of the Act or by any other valid law of the United States.

V

The defendant admits the allegations of Paragraph V.

VI

The defendant admits the issuance of Maximum Price Regulation No. 188 under the pretended authority alleged in Paragraph VI, but denies that it was lawful or binding or that the Price Administrator had authority to issue the same. It alleges, on the contrary, that Regulation No. 188 is so vague, indefinite, and uncertain that even if the Administrator had authority to issue regulations upon the subject, Maximum Price Regulation No. 188 is not valid and binding in that it is impossible to determine who comes within its purview, what commodities are covered by it or what conduct on the part of persons covered by it is lawful and what is unlawful. In this connection, the defendant alleges that Section 203 (a) of the Emergency Price Control Act is unconstitutional and void in that it does not afford persons subjected to regulations, orders, or price schedules prescribed by the Administrator a reasonable opportunity to protest the same and secure relief therefrom and in this specific case it did not afford this defendant a reasonable opportunity so to do.

VII

The defendant admits that Maximum Price Regulation No. 188, issued and effective August 1, 1942, contained the provisions set out in paragraph VII of the Second Amended Complaint. It also contained the following provisions which the plaintiff omitted to set forth in the Second Amended Complaint:

SEC. 1499.161. * * *

(2) In the case of any manufacturer, when it appears with respect to an article set forth in Appendix B of this Maximum Price Regulation No. 188:

(i) That there exists or threatens to exist in a particular locality a shortage in the supply of a commodity which aids directly in the war program or is essential to a standard of living consistent with the prosecution of the war; and

(ii) That such local shortage will be substantially reduced or eliminated by adjusting the maximum prices of such manufacturer and of like manufacturers for such commodity; and

(iii) That such adjustment will not create or tend to create a shortage, or need for increase in price, in another locality, and will effectuate the purposes of the Emergency Price Control Act of 1942, as amended.

Each regional administrator is authorized to make adjustments or act upon applications for adjustment under this paragraph (2).

(3) In the case of any manufacturer who shows:

(i) That he is the sole manufacturer of an essential commodity such as one, the production and sale of which is affirmatively permitted by regulations or orders issued by the War Production Board.

(ii) That the maximum prices established by this regulation do not permit the recovery of total costs, and

(iii) That the operations of the company are currently being conducted at a loss.

Adjustment in price may be made to an extent sufficient to enable the manufacturer to recover total costs on the article, together with a profit. In a proper case, the manufacturer may charge a price equal to the price requested in the application, provided that he has received a letter from the Office of Price Administration stating that this is a proper case. Such price shall be tentative and refunds shall be made to each purchaser in the event that the application is denied in whole or in part. Applications for adjustment under this paragraph shall be filed in accordance with Revised Procedural Regulation No. 1.

Sec. 1499.163. * * *

(2) "Highest price charged during March 1942" means—

(i) The highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March 1942; or

(ii) If the seller made no such delivery during March 1942, such seller's highest offering price to a purchaser of the same class for delivery of the article or material during that month; or

14 (iii) If the seller made no such delivery and had no such offering price to a purchaser of the same class during March 1942, the highest price charged by the seller during March 1942, to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers; Provided, however, That:

(a) If before April 1, 1942, the seller raised his prices for a commodity to all his classes of purchasers (or to all his classes of purchasers except those to which he was bound to make delivery during March 1942 under a firm commitment made before the price rise), and

(b) If during March 1942, he delivered the commodity at the increased price to at least one class of purchasers, then, in order to allow the seller to apply the price rise to any class of purchasers to which no delivery was made during that month after the price rise (except under a firm commitment made before the price

rise), the highest price charged during March 1942 shall be deemed to be:

(1) The seller's increased offering price to such class of purchasers for delivery during March 1942, or

(2) If the seller had no such increased offering price to that particular class of purchasers, the highest price charged during March 1942 to a purchaser of a different class, adjusted to reflect

(i) The seller's customary differential in price between the two classes of purchasers; or

(ii) If the seller had no such customary differential the actual percentage differential in price between the two classes of purchasers which existed at the time the seller last entered into a commitment, or, if he did not enter into such a commitment, last submitted an offering price for delivery to a purchaser of that particular class during March 1942.

Defendant denies that the article or commodity manufactured by it, described as "Miami native rock," "Stone Ballast," "Class 'A' Stone Ballast" or "ballast" is governed by or subject to the provisions of Maximum Price Regulation No. 188.

VIII

The defendant admits that it sold and delivered during March 1942, Miami native rock or Class "A" Stone Ballast according to the specifications of the Seaboard Airline Railway

15 Company, as set out in Paragraph VIII of the Second Amended Complaint. But it denies that the highest prices

charged by it in March 1942 for such stone to purchasers of the same class, was 60¢ a ton, and it avers, on the contrary, that before,

during and after the month of March 1942, it offered for sale and contracted for the sale and delivery of substantially identical rock

to purchasers of the same class at the price of \$1.50 per ton and thus established a selling price at that figure within the meaning

of Maximum Price Regulation No. 188.

THIRD DEFENSE

As to Count II

I

Inasmuch as paragraph I of Count II of the Second Amended Complaint specifically incorporates by reference Paragraphs I, II, IV, V, VI, and VII of Count I, the defendant likewise asks that its defenses to such paragraphs of Count I be considered a part of its defenses to Count II.

II

It denies that the Price Administrator is authorized to bring this action by Section 205 (e) of the Act (Title 50, § 925, U. S. Code) or by any other valid law of the United States.

III

It denies that Section 205 (e) of the Act, or any other valid law of the United States, vests in the Price Administrator the right to bring an action such as this on behalf of the United States for damages in an amount equal to treble the amount by which the sale prices for stone sold by it exceed the maximum price determined in accordance with the provisions of the Act and regulations issued pursuant thereto. The defendant further denies that the buyer is not entitled to bring suit or action under Section 205 (e) of the Act.

Further answering Paragraph III of Count II of the Second Amended Complaint, the defendant denies that the sales of stone ballast made by it occurred more than six months after January 30, 1942, and alleges that, on the contrary, they were made prior to that time.

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IV

The defendant admits that it sold and delivered during March 1942, Miami native rock or Class "A" stone ballast according to specifications of the Seaboard Airline Railway Company as set forth in Paragraph IV of Count II of the Second Amended Complaint. But it denies that the highest price charged by it in March 1942 for such stone to purchasers of the same class was 60¢ per ton and alleges on the contrary that it was \$1.50 per ton.

The defendant admits that it delivered between October 16, 1942, and December 16, 1942, some 25,000 tons of Miami native rock or stone ballast to the Seaboard Airline Railway and charged a price of 85¢ per ton therefor and it admits that between December 11, 1942, and May 28, 1943, it delivered some 92,000 tons of such commodity to the Seaboard Airline Railway for the price of \$1.00 a ton. But it denies that the agreements for the sale thereof were made at such time and alleges on the contrary that they were made long prior thereto and it denies that delivery thereof was unlawful in any respect or that it violated any lawful regulation promulgated under the Emergency Price Control Act or that it violated any valid law of the United States and it denies that the amount by which the prices received by it for Miami native rock and stone ballast sold to the Seaboard Airline Railway Company exceeded the maximum selling price permitted

to be charged by any valid law, rule, or regulation of the United States.

FOURTH DEFENSE

The defendant alleges that all contracts made by it with the Seaboard Airline Railway Company for the sale of the stone ballast described in the Second Amended Complaint were negotiated within six months after January 30, 1942, the time of the enactment and approval of the Emergency Price Control Act of 1942 and so were not within the purview thereof.

FIFTH DEFENSE

The defendant alleges that the sales and delivery of stone ballast, described in the Second Amended Complaint, to the Seaboard Airline Railway Company were for the use by Seaboard Airline Railway Company in maintaining the roadbed of the main line of its railroad between Miami, Florida, and Richmond, Virginia, and that if anyone is entitled to bring suit or action under 17 subsection 205 (e) of the Emergency Price Control Act Title 50, § 925, U. S. Code) or any valid law of the United States, it is the buyer, Seaboard Airline Railway Company, and not the Administrator.

SIXTH DEFENSE

In January 1942, V. P. Loftis Company had a contract with the United States for the construction of the St. Lucie Dam at Stuart, Florida. A representative of this firm telephoned the defendant's plant and requested the quotation of prices for approximately 7,000 cubic yards of crushed stone meeting the following specifications:

CLASS A—PASSING		
Screen 1"	-----	97-100%
Screen ½"	-----	40- 70%
Screen ¾"	-----	0- 6%
CLASS B—PASSING		
Screen 2"	-----	97-100%
Screen 1½"	-----	40- 70%
Screen 1"	-----	0- 6%

A price of \$1.50 per cubic yard F. O. B. Seminole Plant, Miami, was quoted and accepted by the Loftis Company. Later it was agreed that this stone would be shipped F. O. B. Stuart, Florida, and defendant arranged transportation by barge at \$1.00 per cubic yard which made the gross price to the contractor \$2.50 per cubic yard. Attached hereto, marked, "Exhibit A" and made a part

hereof, is a photostatic copy of the purchase order of V. P. Loftis Company, No. 187, dated February 11, 1942, covering "approximately 7,000 cu. yds, crushed stone for 'A' and 'B' type concrete at \$2.50 per cubic yard on-barge Jobsight."

The difference between the price of \$2.50 per cubic yard shown in the purchase order and the price of \$1.50 is the cost of transportation.

Attached hereto, marked "Exhibit B" and made a part hereof is a photostatic copy of Seminole Rock and Sand Company's invoice No. 522, dated January 15, 1942, showing the shipment by it to V. P. Loftis Company, St. Lucie Canal Dam, Stuart, Florida, of a total of 390 cubic yards of Class "A" rock for a total price of \$975.00.

This shipment was made pursuant to the telephone conversation above mentioned, which accounts for the fact that the invoice is dated prior to the purchase order. The latter was in the nature

of a confirmation of the telephone quotation. This shipment of 390 cubic yards was of Class "A" rock which is not the same as the Seaboard ballast. The evidence of this shipment is furnished for the purpose of establishing the fact of the offer to sell rock of both classifications at the same time and at the same price, although only Class "A" was shipped initially. The Class "A" rock was not the same as the Seaboard ballast but the Class "B" rock was and, while the Class "B" rock was not actually shipped at this time, a stock pile of it was being run and accumulated for subsequent shipments.

The Second Amended Complaint alleges (paragraph VII) that the defendant sold and delivered during March 1942 Miami native rock or Class "A" stone ballast according to specifications * * * as follows:

"1. Stone Ballast.—Stone for use in the manufacture of ballast shall break into angular fragments which range with fair uniformity between the maximum and minimum size specified; it shall test high in weight, toughness, wear and soundness, but low in cementing qualities and will be free from dirt, dust, loam or rubbish.

"Tests may be made from time to time at the option of the purchaser and shall be made at a testing laboratory selected by the purchaser, but visual inspection and other tests shall be made at quarry prior to shipments as often as considered necessary. Tests for weight, toughness, wear and soundness shall be in accordance with A. R. E. A. Specifications for Stone Ballast.

"Class 'A' Stone Ballast will range between the sizes which will in any position pass through a two and one-half ($2\frac{1}{2}$) inch ring, and the size which will not pass through a three-quarter ($\frac{3}{4}$) inch ring."

The Class "B" rock offered to the Loftis Company conforms to these specifications. Indeed, the source of both was the same deposit. The quality of the two was identical. The specific gravity of the St. Lucie rock was 2.45. The specific gravity of 2.45 specified in the Loftis order was the minimum; and rock having a specific gravity of 2.47 was acceptable under and conformed to these specifications.

On March 12 Loftis Company wired Seminole as follows:

OPERATIONS ON OUR SUTART CONTRACT TO CONTINUE STOP
CONTINUE SHIPMENTS ON OUR ORDER.

A photostatic copy of this telegram is attached hereto, marked "Exhibit C" and made a part hereof.

However, within a few days (March 21, 1942) Loftis Company advised defendant by letter that no more shipments would be needed until approximately the 1st of May and as their storage space was crowded, none was to be shipped until that time. A photostatic copy of this letter is attached hereto, marked "Exhibit D" and made a part hereof.

Later (on April 29) Loftis directed further postponement of shipments until the middle of June. A photostatic copy of this letter is attached hereto marked "Exhibit E" and made a part hereof.

After the Loftis order was placed, a United States Army Inspector was sent to the Seminole plant to inspect the stock pile, which he did, and after making tests, approved it. He then returned to the Sutart job and came back to the defendant's plant when shipments were resumed about July 1942. He stayed at the plant continuously until the order was filled.

During this time he not only inspected and tested the rock for the Loftis job but he also inspected and tested the rock that was sold to the Seaboard as no particular rock was being run for either job and he did not know in advance what rock ultimately would be sold to Loftis.

During the period of cessation of shipments to Loftis, rock that had been stock piled, inspected, and approved for the St. Lucie Dam was actually sold to the Seaboard for ballast.

Eventually, when the stock pile for the Loftis job had become depleted, this inspector directed that the order be finished with the rock that actually had been intended for the Seaboard for ballast. Thus it will appear that the Seaboard ballast and the St. Lucie stone were used interchangeably.

Under this state of facts, defendant established an offering price of \$1.50 per cubic yard for the same commodity in March 1942 and thus established a ceiling price, at that figure, within the meaning of Maximum Price Regulation No. 188.

SEVENTH DEFENSE

The Emergency Price Control Act of 1942 authorizing the Price Administrator to fix generally maximum prices for articles and commodities is an invalid delegation of legislative power and it is therefore unconstitutional and void.

EIGHTH DEFENSE

The Emergency Price Control Act of 1942 is unconstitutional and void in that:

(a) The Congress failed to establish the standards of legal obligation as required by the Constitution;

20 (b) The Act does not require the Administrator in the exercise of his authority to make express findings of the subsidiary facts on which he acts;

(c) The Emergency Price Control Act of 1942 is without precedent. It supplies no standard for any trade or activity; it does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of regulations to prescribe them, all in violation of the powers of the Congress under the Constitution.

NINTH DEFENSE

That the sales and delivery of stone ballast by the defendant to the Seaboard at the times and in the amounts described in the Second Amended Complaint were made in entire good faith at prices that were reasonable and that were agreed upon between the buyer and the seller; that the material was necessary to the maintenance of the railroad of the Seaboard Airline Railway in order to enable it to operate trains thereover in the transportation of the armed forces of the United States and essential supplies in the defense of the United States and with no intention of violating any lawful statute, rule, or regulation of the United States.

TENTH DEFENSE

By way of counterclaim the defendant alleges that the Seaboard Airline Railway Company is a common carrier by railroad engaged in interstate commerce between Miami, Florida, and Richmond, Virginia, and is now and at all times since Pearl Harbor, been engaged in the transportation of armed forces of the United States and of supplies and material essential to the carrying out of the defense of the United States and that, in order to enable it to maintain and continue to operate its system

of transportation, it is vitally necessary that it be supplied with adequate quantities of rock ballast for its roadbed; that for a number of years the defendant has been supplying the Seaboard with such rock ballast of a satisfactory quality and at satisfactory prices and it has continued so to do throughout the period of the emergency and until the filing of the complaint herein; that there was no other available source in the Miami Area from which the Seaboard could secure the same quality of ballast in the same quantities and at all times the prices charged by the defendant to the Seaboard for its rock ballast were fair and reasonable

21 and that the Seaboard not only agreed to pay the same but agreed that they were fair and reasonable; that it is essential to the successful prosecution of the war that the operation of the railroads of the United States be uninterrupted and it is highly important that the Seaboard continue to receive the rock ballast required by it from the defendant in the maintenance of its roadbed; that in the sale to the Seaboard of rock ballast the defendant has never at any time intended to violate any lawful statute, rule, or regulation of the United States and if any pretended regulation has been infringed, it is within the power of the Administrator, under Maximum Price Regulation No. 188, Sec. 1499.161 (set out more fully in Paragraph VII of the Second Defense), to make an adjustment so as to permit the defendant to continue to supply the Seaboard with necessary rock ballast for its roadbed at the fair and reasonable prices agreed upon between them; that such prices are in line with the prices uniformly charged by other quarries for a similar commodity and such prices have been approved by the Administrator.

Wherefore, the defendant prays that the Court may require the Administrator in this proceeding to approve the price of \$1.50 a ton F. O. B. Miami for the sale of rock ballast by it to the Seaboard Air Line Railway and to authorize it to continue to furnish rock ballast conforming to the specifications described in the Second Amended Complaint to the Seaboard in such quantities as it may require at a price not exceeding \$1.50 per ton.

ELEVENTH DEFENSE

Upon the basis of the allegations contained in paragraph VI, VII, and VIII of the Second Defense and paragraph IV of the Third Defense, the Fourth Defense, the Fifth Defense, the Sixth Defense, and Seventh Defense, the Eighth Defense, and the Ninth Defense, the defendant prays that the plaintiff, his agents, representatives, and attorneys be severally restrained and enjoined from interfering with it in any wise by institution or prosecution of suit or action, or otherwise, from selling or delivering rock ballast

to the Seaboard Air Line Railway Company or any purchaser in the same class at any price not exceeding \$1.50 a ton and that on final hearing such injunction may be made permanent and perpetual.

TWELFTH DEFENSE

On the basis of the allegations in the First Defense, paragraphs II, III, IV, VI, VII, and VIII of the Second Defense, paragraphs II, III, and IV of the Third Defense, the Fourth Defense, the Fifth Defense, the Sixth Defense, the Seventh Defense, the Eighth Defense, and the Ninth Defense, the defendant moves to dismiss the Bill at the plaintiff's cost.

And the defendant demands a jury trial on all of the issues herein to which it is entitled to a trial by jury under the Constitution and laws of the United States and the State of Florida, and under the rules and practices of this Honorable Court.

LOFTIN, ANDERSON, SCOTT, MCCARTHY,
& PRESTON,

By ROBERT H. ANDERSON,

Attorneys for Defendant.

[Duly sworn to by O. H. Barnett; jurat omitted in printing.]

Receipt is hereby acknowledged of a copy of the foregoing answer this January 31st, 1944.

PHARES N. HIATT,

Phares N. Niatt,

Enforcement Attorney,

Jacksonville District Office,

Office of Price Administration,

Seybold Building, Miami, Florida.

Exhibit "A" to answer

V. P. LOFTIS COMPANY

General Contractors

CHARLOTTE, NORTH CAROLINA

Original to Vendor. Purchase Order No. 187. (This number must appear on all invs.) Project St. Lucie Lock & Dam, Stuart, Fla.

Date February 11, 1942.

To Seminole Rock and Sand Company, P. O. Box 3232, Miami, Florida.

23 Please enter our order for the following labor and/or materials conformity with the conditions and instructions listed on face and reverse side hereof:

The following material subject to approval of U. S. Engineers: Approximately 7,000 cu. yds. Crushed Stone for "A" and "B" Type Concrete @ \$2.50 per cu. yd. on barge job site.

Ship to: V. P. Loftis Company. Destination: Stuart, Florida.

Care of:

Accepted:

V. P. LOFTIS COMPANY,
By J. G. KELLOGG,
Purchasing Agent.

Exhibit "B" to answer

SEMINOLE ROCK & SAND CO.

P. O. Box 3232

MIAMI, FLORIDA

Refer to Invoice No. 522.

Invoice date Jan. 15/42.

Sold to V. P. Loftis Company, Stuart, Fla.

Shipped to and Destination V. P. Loftis Company, St. Lucie Canal Dam, Stuart, Fla.

Date Shipped Jan. 15/42.

From Hialeah, Fla.

F. O. B. Plant.

Quantity	Stock number	Description	Unit price	Amount
Jan. 15/42	Barge #17	114 Cu. Yds. Special Rock (A) TNTNO 8590	@ \$2.50	\$285.00
Jan. 15/42	Barge #14	86 Cu. Yds. Special Rock (A) TNTNO 8590	@ \$2.50	215.00
Jan. 15/42	Barge #6	101 Cu. Yds. Special Rock (A) TNTNO 8590	@ \$2.50	252.50
Jan. 15/42	Barge #19	89 Cu. Yds. Special Rock (A) TNTNO 8590	@ \$2.50	222.50
		390		975.00

Tested for specific gravity and gradation by Inspector from U. S. Eng. Office, Jax, Fla.

300 Rock	585.00
Backups	390.00
	<hr/> 975.00

22 CHESTER BOWLES VS. SEMINOLE ROCK & SAND CO.

24 *Exhibit "C" to answer*

TELEGRAM

QB00
CF A6 58 13 PO CHARLOTTE NCAR 12 312P MAR 12 PM 3 37.
SEMINOLE ROCK AND SAND CO
ATTN H E POST MIAMI FLO
OPERATIONS ON OUR STUART CONTRACT TO CONTINUE STOP
CONTINUE SHIPMENTS ON OUR ORDER
V. P. LOFTIS CO KELLOGG

Exhibit "D" to answer

V. P. LOFTIS COMPANY

General Contractors

Builders Building

CHARLOTTE, NORTH CAROLINA

P. O. Box 952,
Stuart, Fla., March 21, 1942.

Re: St. Lucie Lock & Dam

SEMINOLE ROCK & SAND COMPANY,

P. O. Box 3430, Miami, Fla.

Att: Mr. Rankin.

GENTLEMEN: Reference to your letter of March 18, we were at this time working 16 hours a day on the cofferdam, which will take approximately 30 days to complete. In the meantime, we will not be pouring any concrete; therefore, we will not need any more shipments until approximately the first of May.

We are somewhat crowded for storage space at this time; however, when shipments are resumed we feel that we can accommodate a stock pile of 1,000 yards. This being the case, shipments can be continuous after the first of May.

Yours very truly,

V. P. LOFTIS COMPANY,
By J. G. KELLOGG.
J. G. Kellogg.

M.

cc: Charlotte office.

25

Exhibit "E" to answer

V. P. LOFTIS COMPANY

General Contractors

Builders Building

CHARLOTTE, NORTH CAROLINA

STUART, FLA.,

P. O. Box 952, April 29, 1942.

Re: St. Lucie Lock & Dam

SEMINOLE ROCK & SAND COMPANY,

P. O. Box 3430, Miami, Fla.

Att. Mr. Benson.

GENTLEMEN: Acknowledging your letter of April 28. We are making considerable progress at this time with present indications that we will resume pouring concrete approximately the last of June. Your shipments therefore, can start about the middle of June. We will notify you more definitely as time goes on.

Yours very truly,

V. P. LOFTIS COMPANY,

By: J. G. KELLOGG.

J. G. Kellogg.

JGK:AM

File on board with order. B. B.

In United States District Court

Motion to dismiss and to strike

Filed Feb. 17, 1944

[Caption omitted.]

The Plaintiff, Chester Bowles, as Administrator of the Office of Price Administration, moves the Court as follows:

1. To dismiss the Eleventh Defense alleged in Defendant's Answer herein, and to dismiss each and every paragraph of said Answer upon which said Eleventh Defense is therein expressly based, insofar as the same are relied upon the Defendant in support of said Eleventh Defense, on the ground that this

26. Court has no jurisdiction of the subject matter of said Defense because Section 204 (d) of the Emergency Price Control Act of 1942 (Act of January 30, 1942, 56 Stat. 23, 33, 50

U. S. C. A., Appendix § 925 (a)) expressly withholds from this Court jurisdiction to enjoin the enforcement of the Emergency Price Control Act or any regulation issued thereunder or any provision thereof.

2. To dismiss Defendant's alleged Tenth Defense and the pretended counterclaim asserted therein on the ground that the same fails to state a claim against this plaintiff upon which relief can be granted, and on the further ground that this Court has no jurisdiction of the subject matter of said Defense and said pretended counterclaim because:

(a) Section 204 (d) of the Emergency Price Control Act of 1942 (Act of January 30, 1942, 56 Stat. 23, 33, 50 U. S. C. A., Appendix § 925 (a) expressly withholds from this Court jurisdiction to entertain the pretended claim asserted in said Tenth Defense.

(b) Under the Emergency Price Control Act of 1942 the matter of the adjustment in the price of a commodity governed by a Price Regulation is a matter entrusted by the Congress to the judgment and the discretion of the Price Administrator and this Court should not assume jurisdiction to control and will not control the exercise of that judgment and discretion.

(c) Defendant's Answer fails to allege that Defendant has exhausted the administrative remedies, open and available to it under the Emergency Price Control Act and regulations issued thereunder, for petitioning the Price Administrator for an adjustment in the price of the commodity involved in this cause.

3. To strike, insofar as the same are relied upon by Defendant in support of its Motion to Dismiss the Plaintiff's Bill herein, the following allegations of Defendant's Answer herein, to wit: Paragraphs VII and VIII of the Second Defense, the second paragraph of Paragraph III and the last sentence of Paragraph IV of the Third Defense, the Fourth Defense, the Sixth Defense, and the Ninth Defense, on the ground that the same, and the whole thereof, are wholly incompetent and irrelevant to the issues properly raised by Defendant's Motion to Dismiss herein; and, if the same are competent or irrelevant, the same raise only issues of fact which cannot be heard or determined upon a motion to dismiss the bill.

4. To dismiss or strike on the ground that the same, and each of them, fail to state a legal defense to Plaintiff's claims herein the following matters and pretended defenses alleged in Defendant's Answer herein, to wit:

27 (a) That part of Paragraph VI of the Second Defense which alleges that Maximum Price Regulation No. 188 is invalid.

(b) All of Paragraph VII of said Second Defense, save and excepting only the last paragraph thereof.

(c) That part of Paragraph I of the Third Defense which incorporates by reference the foregoing described portions of Paragraphs VI and VII of the Second Defense.

(d) The Sixth Defense and the whole thereof.

(e) The Ninth Defense and the whole thereof.

(S) FLEMING JAMES, JR.,
Fleming James, Jr.,
Director, Litigation Division,
Federal Office Building No. 1,
Rm. 3103, Washington, D. C.

(S) JOHN D. MOSBY,
John D. Mosby,
Regional Litigation Attorney,
Candler Building, Atlanta, Georgia.

(S) C. H. LICHLITER,
C. H. Lichliter,
District Enforcement Attorney,
Jacksonville District Office,
Jacksonville, Florida.

(S) PHARES N. HIATT,
Phares N. Hiatt,
Enforcement Attorney,
Jacksonville District Office,
Seybold Building, Miami, Florida,
Attorneys for Plaintiff.

Dated February 16, 1944.

I acknowledge receipt of a copy of the foregoing notice and motion this February 17, 1944.

LOFTIN, ANDERSON, SCOTT, MCCARTHY,
& PRESTON,
By ROBERT H. ANDERSON,
Attorneys for Defendant.

In United States District Court

On May 6, 1944, Transcript of proceedings and testimony taken incident to hearing at Miami, Florida, on February 28-29, 1941, together with all exhibits, stipulations, and depositions was filed in words and figures as follows, to wit:

Transcript

Transcript of proceedings had and testimony taken in the above-entitled cause before the Hon. Alexander Akerman, District Judge, at Miami, Dade County, Florida, on the 28th day of February A. D. 1944, commencing at two p. m.

Appearances: Lowell J. Grady, of Washington, D. C., C. H. Lichliter, of Jacksonville, Florida; P. N. Hiatt, of Miami, 28 Florida, and J. M. Roberts, of Atlanta, Georgia, for the Plaintiff. Loftin, Anderson, Scott, McCarthy & Preston, of Miami, Florida (By Messrs. Anderson and McCarthy) for the Defendant.

Reported by Henry E. Colman, Official Court Reporter, Miami, Florida.

Colloquy

The COURT. This is the case of Chester Bowles, as Administrator of Office of Price Administration against the Seminole Rock & Sand Company. Is the plaintiff ready to proceed?

Mr. LICHLITER. Yes, sir.

The COURT. Is the defendant ready to proceed? •

Mr. ANDERSON. We are.

The COURT. Will counsel for the plaintiff and the defendant give me a brief outline of what the case is about? I find that, I can follow the evidence much better if I have an understanding of what it relates to.

Mr. ANDERSON. Inasmuch as it is here on an application for a restraining order, I think perhaps we are the moving party.

Mr. LICHLITER. If the Court please, in that connection the matter is before your Honor also on our motion on behalf of the plaintiff, and in that connection I think it would be in order to just state what this bill is, first.

The COURT. Let him state what he wants to; and then I will hear you. It doesn't make any difference in what order it is presented.

(Opening statements by Messrs. Lichliter and Grady for the Plaintiff, and Mr. Anderson for the defendant.)

Mr. ANDERSON. Now I should like to present, pursuant to the notice I served on counsel, a witness, to show that we are not violating any law or regulation. I would now like to call a witness for the purpose—

The COURT. Let's see where we are. You are not moving for an interlocutory injunction; is that correct?

Mr. LICHLITER. We are not asking for a preliminary injunction at this stage. We take the position that this matter is in the nature of a demurrer to the bill of complaint, for the reasons set forth—

The COURT. Of course you are not asking for an interlocutory injunction?

Mr. LICHLITER. No.

The COURT. And you are, Mr. Anderson?

Mr. ANDERSON. We are; yes, sir.

Mr. LICHETER. At this stage of the proceeding that is a matter which cannot be considered, in that the effect of your Honor allowing that question to be raised at this time would
 29 | be counter to the provision of Section 204 (d) which would be, in effect, enjoining the operation of a regulation issued under the Emergency Price Control Act, which we state is not within the jurisdiction of this Court.

The COURT. Do you gentlemen want to argue the motion to dismiss separately, or shall we go ahead and argue all phases at the conclusion?

Mr. GRADY. I think that is a matter as to which we will be guided by the practice of the Court.

Mr. LICHETER. We object on the jurisdictional ground—that there is an absence of jurisdiction upon your Honor to consider his motion for an injunction at this time. We take the position that under the Act the Court would be precluded from hearing that.

The COURT. Don't you think, Mr. Anderson, that we should dispose of that first?

Mr. ANDERSON. That would be entirely all right except for the fact that I have some witnesses here who are not connected with this company, and I would like to let them go as soon as possible.

Mr. GRADY. In addition to the motions to which allusion has already been made, we have a motion to dismiss their pretended counterclaim stated in their tenth defense; and we also have a motion to strike from the answer (insofar as it may relate to their motion to dismiss) certain allegations. Now if the Court should care to hear the substance of our motions in that respect, I am prepared to go ahead now.

The COURT. Let's get it all in and then have one argument on it all.

Mr. GRADY. Do I understand that you wish to take up at this time the defendant's motion for a preliminary injunction against the Administrator?

The COURT. Yes. And we will argue it all after we get through with his testimony.

Mr. GRADY. So that there will be no misunderstanding, your Honor, and to the end that I will not have to repeatedly make objections into the record, may it be understood that the plaintiff Chester Bowles, as Administrator of the Office of Price Administration, at this time objects to the introduction of any testimony, oral or otherwise, or any depositions, documentary proof, or exhibits of any kind, in support of the defendant's pretended counterclaims for injunctive relief against the plaintiff as such counterclaim and prayer for injunctive relief as set forth in the eleventh defense of defendant's answer herein, on the ground that

the same and the whole thereof is wholly incompetent and irrelevant and may not be reviewed by this Court because Section 204 (d) of the Emergency Price Control Act, upon which the bill of complaint herein is predicated, expressly withdraws from this Court jurisdiction or power to restrain or enjoin the enforcement of any provision of the Emergency Price Control Act or any price schedule issued in pursuance thereof.

In support of that objection the plaintiff alleges that this suit was started by the plaintiff as Administrator of the Office of Price Administration to obtain from this Court an order, under Section 205 (a) of the Act, enjoining violations of the Act by the defendant; that the regulation involved is Maximum Price Regulation No. 188 issued by the Administrator under the authority of the Act.

The COURT. Is that agreeable, Mr. Anderson?

Mr. ANDERSON. By all means, but I want to make it plain that the testimony I am asking the Court to receive now is not directed against the validity of any regulation, order, or price schedule—but to show that we are complying with them. That is the purpose of this testimony.

The COURT. Here is the notice that you served, so let's see where we are [reads notice]. That brings up your motion to dismiss their bill of complaint?

Mr. ANDERSON. Yes.

The COURT. And their motion to dismiss your counterclaim?

Mr. ANDERSON. Yes, sir.

The COURT. And also your motion for an interlocutory injunction?

Mr. ANDERSON. That is correct.

The COURT. Those are the three things that we have before us?

Mr. ANDERSON. That is correct.

The COURT. All right, let's take the evidence and then we will hear arguments.

Mr. GRADY. So that the record may be straight, it is my understanding that you want to proceed now under the defendant's application for a preliminary injunction against the administrator, as set forth in the eleventh defense, and I was merely stating our objections into the record—

The COURT. I understand. Your objections are in the record.

Mr. GRADY. May it further appear in the record that the objection is predicated upon the fact that seeking this equitable relief by their pretended counterclaim in the eleventh defense is actually seeking to restrain the enforcement of the Act.

The COURT. If you prevail on that argument, then Mr. Anderson's testimony will be "love's labor lost."

31 Mr. GRADY. To avoid repeating the objection, may it be understood that this objection will stand to all of the testimony?

The Court. That is right.

Thereupon BARRY W. BENSON, a witness on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. ANDERSON:

Q. What is your name?

A. Barry W. Benson.

Q. Well; where do you live, Mr. Benson?

A. 450 S. W. 21st Road, Miami, Florida.

Q. How long have you lived in Miami?

A. For about four and a half years this last time, but I have been in Miami off and on for 15 years or more.

Q. What business are you in?

A. I am engaged in the rock business at the present time.

Q. How long have you been in the rock business?

A. I have been connected with it more or less since December 1939.

Q. Are you in business for yourself at this time?

A. I am associated with another man in business in which we contemplate eventually a partnership, but right now it is operated under his name.

Q. You are not working for the Seminole Rock and Sand Company?

A. No.

Q. Did you ever work for them?

A. Yes.

Q. When?

A. From December 1, 1939, to August 31, 1943.

Q. During that time, and particularly along in the spring of 1942, did you put in effect any changes in operation of the Seminole plant whereby the product was improved?

A. We did.

Q. Tell the Court what you did.

A. Well, sometime prior to that time, in fact, in 1941, during that year we started to think and plan towards producing a higher quality aggregate that we had even been producing in the Miami area before. It was a known fact that the deposit at the Seminole Rock and Sand was operating in a pit of rock which would test higher than any other deposits in the area, but up to that time there had been no successful way of separating that rock in such a way as to produce it in order to meet the standard engineering specifications. In fact, up until that

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time none of the rock in South Florida had ever met the specifications that were established by the Florida State Road Department and other engineers. Rock had been imported from the northern part of the State, and even had been shipped by water from New York to meet those specifications. So we conceived the idea that there must be some way of working that deposit in order to take advantage of the hard rock that we knew was present there, and produce an aggregate that would meet these standard engineering specifications.

We worked on that problem all during the year 1941. In fact, we installed some new type of crushers that we found gave very excellent results in the rock produced. In fact, the rock, after passing through this special type crusher, was about the hardest rock that was in the deposit. So we did a lot of experimental work in developing this aggregate—adjusted the methods of the plant operation and the quarry operations, to take advantage of this. It was during the latter part of 1941 that we were able to bring this thing to a head and finally develop methods that would enable us to produce this higher quality aggregate that would meet these specifications, and it was in the latter part of December 1941, that we finally perfected these methods where we knew we could handle our operations and meet these specifications which had never been met before. With this assurance we planned to develop this aggregate and get entirely away from the production of aggregates similar to other producers in this area, get away from that competition, and go solely into the production of these higher aggregates.

Q. Did you accomplish that?

A. Yes; we did.

Q. I omitted to ask you what was your position then with the Seminole plant?

A. I was first engaged as engineer, assisting in the design and erection of their new plant, and during the latter part of my association with them I assisted some in the management.

Q. Did you have authority at the plant; were you in charge out there?

A. Of the operations; yes.

Q. These improvements were your own ideas?

A. Well, not entirely. They were worked out with others who were associated with the company. I had the responsibility of carrying them out.

Q. Did you carry them out?

A. Yes.

33

Q. And what was the result?

A. The result was that we were able to produce an ag-

gregate which would meet the engineers' specifications, something that no other producer in this area could meet.

Q. Was it a superior grade of rock than that you had produced prior to that?

A. Unquestionably.

Q. Are these pictures of that plant of the Seminole Rock & Sand Company when you were there?

A. That is right.

Mr. ANDERSON. We offer these photographs in evidence.

Mr. GRADY. No objection other than our general objection.

The COURT. Admitted.

(Said photographs marked "Defendant's Exhibits 1 and 2," respectively.)

Q. Was this transition period, if I may call it that, going on in the early part of 1942?

A. It was.

Q. Early in 1942 did your plant get an order for some rock from the V. P. Loftis Company?

A. Yes, sir.

Q. I hand you a photostatic copy of what purports to be such an order and ask you to examine it and say if it was received by you?

A. Yes; it was received by me.

Mr. ANDERSON. We offer this in evidence, and I would like to have it marked "Exhibit A," being the same identifying designation it bears as an exhibit to the answer.

The COURT. Admitted.

(Photostatic copy of said order marked "Defendant's Exhibit A"; identical with Exhibit A attached to answer R. 22, Supra.)

Q. I hand you what purports to be a Seminole Rock and Sand Company invoice to V. P. Loftis Company dated January 15, 1942, and ask you to examine it and say if it is.

A. Yes.

Mr. ANDERSON. I offer this Exhibit B, being Exhibit B to the answer.

The COURT. Admitted.

(Said invoice marked "Defendant's Exhibit B"; identical with Exhibit B attached to answer R. 23, Supra.)

Q. After you got that purchase order what did you do toward filling it?

A. Well, we immediately started making special stock piles for them to have their engineers test.

Q. Did you make a stock pile?

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A. Yes; two of them.

34 Q. How big?

A. I would say a thousand to fifteen hundred yards in each.

Q. Did they send an inspector down to inspect it?

A. Yes.

Q. Did he do so?

A. Yes.

Q. Do you remember his name?

A. Smith.

Q. Earl Smith?

A. I don't recall his first name.

Q. Was he an inspector of the United States Army Engineer's office?

A. That is right.

Q. He came to your plant and inspected the stock piles?

A. Yes, sir; and approved them.

Q. Was any of it actually shipped?

A. Yes.

Q. How much of it?

A. That one order covered by that invoice.

Q. Later did you get this telegram from V. P. Loftis Company dated March 12, 1942?

A. Yes.

Mr. ANDERSON. I ask that this telegram be marked "Exhibit C," the same designation it bears with respect to the answer.

The Court. Admitted.

(Said telegram marked "Defendant's Exhibit C"; identical with Exhibit C attached to answer R. 24, Supra.)

Q. I hand you what purports to be a letter from V. P. Loftis Company dated March 21, 1942, which I shall ask you to examine and state if you received it.

A. Yes, sir.

Mr. ANDERSON. I would like to have this marked "Exhibit D," being the same designation the instrument bears as an exhibit to the answer.

The Court. Admitted.

(Said letter marked "Defendant's Exhibit D"; identical with Exhibit D attached to answer R. 24, Supra.)

Q. Did you get a further letter dated April 29, 1942, from the Loftis Company?

A. That is correct.

Q. Is any of your handwriting on that letter?

A. There is a notation on that letter that I made.

Q. You made it at the time you got the letter?

A. That is correct.

Mr. ANDERSON. I ask that this be marked "Exhibit E."

The COURT. Admitted.

35 (Said letter marked "Defendants' Exhibit E"; identical with Exhibit E attached to answer R-25, Supra.)

Q. When you made this stock pile to fulfill the Loftis contract, in reality it was inspected and approved by the Army inspector, and you shipped part of it to Loftis?

A. Yes, sir.

Q. Was it a large part or a small part?

A. It was a minor part; less than half of one of the piles.

Q. Did you ever ship to Loftis the balance of it?

A. Not from that pile.

Q. What did you do with it?

A. We shipped it to the Seaboard as ballast.

Q. When did you complete making that stock pile for Loftis and when did the Army engineer inspect and approve it?

A. Sometime in January.

Q. 1942?

A. Yes, sir.

Q. Are you sure it was prior to March 1942?

A. Yes, sir.

Q. Now, Mr. Benson, had you been shipping ballast to the Seaboard for some time?

A. Yes.

Q. Ever since you had been there?

A. That is right.

Q. I believe you said you left the Seminole about August of 1943?

A. That is right.

Q. How did the ballast that you were shipping the Seaboard compare to that you had shipped them before you put in this new process?

A. The ballast we shipped at that time was the new higher quality aggregate, whereas what we shipped before was just the ordinary run comparable to the other local rock.

Q. Did you make a trip to Norfolk for the purpose of conferring with any individuals or officials, rather, of the Seaboard with respect to the ballast?

A. Yes, sir.

Q. With whom did you make that trip?

A. Mr. John Sexton.

Q. Was he an employee of the Seminole Rock and Sand Company?

A. No, sir.

Q. Is he employed by them now?

A. I don't know just what the connection is now. At that time he was with Southern Agriculture—

Q. He went to Norfolk with you?

A. That is right.

36 Q. To interview the Seaboard officials?

A. Yes.

Q. Can you fix the date of that visit?

A. It was on July 21, 1942.

Q. Prior to that time had you made any calculations to determine what price would have to be charged for ballast in order to enable its sale to be profitable?

A. Yes; I had made estimates of the extra cost of producing ballast, in addition to our plant operation at that time, which was completely taken up with government orders.

Q. Had you come to any conclusion as to what charge had to be made at that time?

A. Yes; I had a figure in my mind which I recommended to the officials of the company.

Q. As a matter of fact, didn't you make a written memorandum to the company, which included your recommendations?

A. Yes; my recommendation was included in the memorandum sent to Mr. John Sexton who was handling our contracts with Seaboard.

Q. And what was the figure that you concluded should be charged, the figure you recommended to the company to charge, based upon your study of the entire situation?

A. \$1.00 a ton.

Mr. GRADY. That, your Honor, we move to strike, and we wish to interpose the additional objection that the same is wholly immaterial.

The Court. Ruling reserved.

Q. Did the officials of the Seaboard ultimately agree to pay that price?

A. Yes, sir.

Q. Did they actually pay it?

A. Yes, sir.

The Court. "Officials of the Seaboard" is a rather broad term. Maybe you had better find out who it was.

Mr. ANDERSON. I have taken the deposition of their Purchasing Agent, and I will tie that in.

The Court. All right. The Court will take judicial notice of the fact that there are many officials, some of which are very charming men.

Mr. ANDERSON. At this point I would like to ask your Honor to open or direct the Clerk to open the deposition of Mr. J. L. Brown, the Purchasing Agent of the Seaboard.

The COURT. Is there any objection to the return of the deposition?

Mr. GRADY. No objection to the return, but we of course object to its admissibility for this purpose.

37 The COURT. The deposition may be opened and published. (Said deposition opened by the Clerk.)

Q. Mr. Benson, attached to this deposition of J. L. Brown is what purports to be a copy of a letter dated September 1, 1942, marked "Defendant's Exhibit number 6" for identification. I will ask you to examine it and say whether you ever saw that instrument before.

A. Yes. This is a copy of an estimate that I prepared in regard to the cost of the ballast.

Q. You prepared it with reference to the ballast that was being produced by the Seminole Rock and Sand Company?

A. That is right, and in consideration of this order.

Mr. ANDERSON. This has already been marked for identification, and I am now going to offer it in evidence. The witness whose deposition was taken merely identified it.

Mr. GRADY. To which we make the same objection previously interposed, and the specific objection that it is wholly immaterial.

The COURT. Admitted.

(Said instrument marked "Defendant's Exhibit F" and appears at R. 81, infra.)

Q. Were you at the Seminole plant in the spring of 1943?

A. Yes.

Q. At that time were you visited by a representative of the OPA?

A. Yes.

Q. What was his name?

A. Mr. Arnold.

Q. Would you know him if you saw him again?

A. Yes, sir.

Q. I point out a gentleman sitting on the front row in the courtroom and ask you if that is the gentleman?

A. Yes, sir.

Q. He represented the OPA?

A. Yes.

Q. He came out to the Seminole plant?

A. Yes.

Q. Did he tell you for what purpose?

A. Not at first.

Q. What did he want?

A. He wanted to ask a lot of questions about what we were selling and the prices we were asking.

Q. Did you answer his questions?

A. Yes, sir.

Q. Did he ask to be shown your books and records?

A. Yes, sir.

38 Q. Did he see them?

A. Yes, sir.

Q. Did he make any request that you refused to comply with?

A. None at all.

Q. How long was he there?

A. He was there a number of times and stayed several hours each time.

Q. Over what period of time were his visits made; a week, two weeks or a month?

A. His first visit was sometime in April 1943 and the last time he came was in August 1943.

Q. During that period of time he was more or less a regular visitor, would you say?

A. He came very frequently.

Q. Always for information?

A. Yes.

Q. Did you give it to him?

A. Yes.

Q. Did he tell you at any time that you were violating any OPA regulation?

A. No.

Q. Did he tell you at any time to stop shipping ballast to the Seaboard?

A. No.

Q. Did he know you were shipping ballast to the Seaboard?

A. Yes, sir.

Q. Did he know the prices you were charging the Seaboard?

A. Yes, sir.

Mr. ANDERSON. You may inquire.

Mr. LICHLITER. No questions.

Mr. GRADY. At this time the plaintiff moves to strike the testimony of the witness who has just given his testimony on the grounds heretofore stated in our objections, and on the further ground that the same and the whole thereof is wholly irrelevant, incompetent, and immaterial.

The COURT. Decision reserved.

Mr. GRADY. For the record, Mr. Anderson, I assume that it is also your purpose to use this testimony in support of your motion to dismiss; is that right?

Mr. ANDERSON. Yes, sir.

Mr. GRADY. It was my understanding when I first made my objection that we were taking up just the question of their prayer for—

The COURT. I never heard of evidence on a general motion to dismiss.

39 Mr. GRADY. He says now that he intends to use it in support of his motion to dismiss, so I want to object to that testimony insofar as it is relied upon on their general motion to dismiss, on the ground that it is irrelevant.

The Court. A general motion to dismiss must rest on the face of your complaint.

Mr. GRADY. That is correct; but I want our objection noted in the record.

Thereupon C. R. LAWRENCE, a witness on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. ANDERSON:

Q. Please state your name.

A. C. R. Lawrence.

Q. Where do you live?

A. Miami at the present time.

Q. What is your business?

A. Office Manager for V. P. Loftis Company, on the 36th Street job.

Q. Construction work at the 36th Street airport in the city of Miami?

A. Yes.

Q. How long have you been with V. P. Loftis Company?

A. A year and a half.

Q. Is that the same company that in 1942 was building the St. Lucie dam at Stuart?

A. Yes.

Q. Do you know whether that company ordered from Seminole Rock and Sand Company any rock to be used in the construction of the St. Lucie dam?

A. Yes, it did.

Q. Do you know how much they paid for it?

A. My understanding was \$1.50 a ton.

Q. After that time did you have occasion to order any further quantities of rock from the Seminole Rock and Sand Co.?

A. Yes, sir.

Q. Over what period of time?

A. We bought rock from the Seminole Rock and Sand Company from May—we started building our stock pile in March 1943 and finished buying from them in October 1943.

Q. In that time how much rock did you buy from the Seminole Rock and Sand Company?

A. A little over 70,000 tons.

Q. How much did you pay for it?

40 A. \$1.50 a ton.

Q. Do you know whether or not that was the prevailing price of rock of that quality in Dade County?

A. That was the prevailing price and it was to our advantage to buy it from Seminole Rock and Sand Company on account of the site location.

Q. Now, Mr. Lawrence, I read you from the second amended complaint in this case the following specifications concerning stone ballast:

"Stone for use in the manufacture of ballast shall break into angular fragments which range with fair uniformity between the maximum and minimum size specified; it shall pass high in weight, toughness, and soundness but low in cementing qualities, and will be free from dirt, dust, loam, or rubbish. Tests may be made from time to time at the option of the purchaser and shall be made at testing laboratory selected by the purchaser, but visual inspection and other tests shall be made at quarry prior to shipments as often as considered necessary. Tests for weight, toughness, wear, and soundness shall be made in accordance with A. R. E. A. specifications for stone ballast. Class 'A' stone ballast will range between a size which will in position pass through a 2¼" ring and a size which will not pass through a ¾" ring."

Now, would you say that the stone you bought from the Seminole Rock and Sand Company would or would not conform to these specifications?

A. It would.

Mr. ANDERSON. You may inquire.

Mr. GRADY. No questions. We repeat for the record the same motion to strike the testimony of this witness on the grounds heretofore stated, and on the further ground that the same is irrelevant, incompetent, and immaterial.

The COURT. I will reserve decision.

Mr. ANDERSON. I would like to read to you the deposition the opening of which your Honor just authorized.

Mr. GRADY. May it be understood that the same objection will run to it?

Mr. ANDERSON. Surely. By all means.

(Deposition of J. L. Brown read to the Court; see R. 53 et seq. infra.)

Mr. ANDERSON. I offer this deposition and the exhibits thereto attached.

Mr. GRADY. The same objection.

41 The COURT. Ruling reserved.

Mr. GRADY. May it be understood that our objection stands not only to the deposition itself but to each and every question contained therein?

The COURT. It is so noted. We will recess now until eleven o'clock tomorrow morning.

(Hearing recessed to 11:00 A. M., Feb. 29, 1944.)

MIAMI, FLORIDA,

February 29, 1944, 11:00 o'clock, A. M.

Hearing resumed pursuant to adjournment.

Appearances: Same as heretofore noted.

The COURT. Are you ready to proceed, Mr. Anderson?

Mr. ANDERSON. Yes, your Honor. Will your Honor open or direct the Clerk to open the deposition of Earl Smith?

The COURT. Is there any objection to the return?

Mr. GRADY. No objection to the return, but we interpose our general objection.

Mr. ANDERSON. All of Mr. Grady's objections are preserved in full faith and credit.

Mr. GRADY. It is understood that the same general objection stands?

Mr. ANDERSON. Absolutely, Mr. Grady; absolutely.

(Deposition of Earl Smith opened in open court by the Clerk.)

Mr. ANDERSON. I trust that I made it clear on yesterday to the Court that the burden of the second amended complaint was that the defendant is alleged to have violated ceiling prices, that is to say, had charged a price for its ballast in excess of the price that it charged in March 1942, and the testimony that was offered on yesterday was to establish the fact that the defendant sold similar commodities to other persons prior to March 1942 for as much as \$1.50 a ton. Now the deposition I shall now read to your Honor is in further corroboration of that, for the purpose of establishing the fact that the stone or rock that was sold to the Loftis Company was identically the same product that was sold to the Seaboard for ballast. In short, there is no magic in names. We call it stone to one and ballast to another, but it makes no difference because, in the final analysis; it was the same stuff.

(Deposition of Earl Smith read to the Court. See R. 82 et seq. infra.)

Mr. ANDERSON. Now I offer in evidence this deposition.

Mr. GRADY. The same objection.

42 The COURT. Ruling reserved.

Mr. ANDERSON. Take the stand, Mr. Brushwood.

Thereupon J. W. BRUSHWOOD, a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direction examination by Mr. ANDERSON:

Q. What is your name?

A. James W. Brushwood.

Q. Where do you live?

A. 562 Northwest 46th Street, Miami.

Mr. GRADY. Let the record show that the same objections are interposed to the testimony of this witness.

Q. Are you connected with the Seminole Rock & Sand Company?

A. I am.

Q. Were you connected with the Seminole Rock & Sand Company in the summer of 1942?

A. Yes.

Q. Do you remember the occasion when the Seaboard undertook to put an order with the Seminole Rock & Sand Company for some 115,000 tons of rock?

A. Yes.

Q. Did you initially accept or reject that order?

A. No; it was turned down.

Q. Why was it turned down?

A. Well, at that time the government was taking all, or practically all, of our production. To go back just a second on that, I think it was probably a month before that when Major McSpadden at Boca Raton asked me to come up to see him. We were shipping a substantial quantity to the Seaboard about a month or two months before this order came in. He said he needed some rock very badly. I explained to him that I couldn't handle it and suggested that he try to get it elsewhere. I remember that he inquired at the time where our rock was going to, and I told him we were shipping ballast to the Seaboard, and he said, "Do you think that is as essential as essential war work," and I said that we thought it was essential war work to maintain railroads. He then asked me why didn't we ask the railroad to release us, and I told him I didn't think we could, because we had a contract with them. Then he wanted to know if we objected to him asking them, and I told him that we didn't have any objection and couldn't stop him from doing so even if we wanted to. Shortly after that we received a telegram from the United States Engineer at Jacksonville.

Q. Is it one of these?

A. Yes; dated August 24th.

Mr. ANDERSON. I offer this telegram in evidence.

Mr. GRADY. The same objection.

The Court. Admitted.

(Said telegram was marked "Defendant's Exhibit G.")

Q. Did the Army continue to demand the entire output of your plant?

A. Yes. In August they called up and told us that if we didn't stop shipping ballast they would invoke their priority regulations.

Q. Did they wire you confirming that conversation?

A. Yes; that is the telegram you have there. A few days after that a War Production Board man came into my office, and he said, "I understand you are shipping ballast," and I told him that we had stopped. He said, "Do you think you can ship ballast to the Seaboard when you have these government orders out there? You have too many government orders." I said, "I didn't know we couldn't ship it under a contract." I said to him, "don't you think ballast is essential," and he said, "that is not the point. They have only an 1-A-J rating, and your plant cannot ship on such a rating when you have unfilled government orders of AA-3 or better."

Q. Now did this discussion with this government official involve any question of price?

A. No; none whatever.

Q. What was the government paying you for the rock it was buying?

A. \$1.50 a ton.

Q. That was more than the Seaboard was paying for the ballast?

A. That is right.

Q. Did your company, in order to comply with the government's demand and still furnish the Seaboard some ballast, make any new arrangements of its plant or operating facilities?

A. Yes; we had to.

Q. Just briefly tell us about that.

A. When that order was turned down it was not turned down because of price. We simply couldn't handle it, because it would take practically everything. We wired the Seaboard regretting our inability to handle it, and they immediately contacted Mr.

44 Sexton in Raleigh and Mr. Sexton wanted to know if something could be worked out whereby we could take care of it. He said the Seaboard had tried various places to get the order filled, but couldn't do so. After that there were negotiations started, and eventually the Seaboard arranged to bring their switch engines in on our track, and we reinforced them, put more power on the dredge and put ditching machines in to augment production to take care of the order.

Q. In that way you were able to meet the government demand and also furnish ballast for the Seaboard?

A. Yes.

Q. Was that an expensive operation?

A. Yes.

Q. After you put in these new facilities did you make any calculations to ascertain what were the costs of production of your rock?

A. Yes. Our costs were compared each week by certified public accountants, and they were increased each month, rising, in the latter part of 1949.

Q. Who were your certified public accountants?

A. Ring, Mahony & Arner.

Q. Is that a responsible and reliable firm of accountants?

A. We thought so.

Q. What did the cost run?

A. I think it eventually got up in the neighborhood of 92 cents a ton, unit cost.

Q. That is the actual cost of production?

A. That is right.

Q. Do you know Mr. Arnold?

A. Yes, sir.

Q. Where did you make his acquaintance?

A. Mr. Arnold came into our office in the early part of 1943. I am not sure of the month, but I think it was in March.

Q. Did you see him?

A. The bookkeeper came into my office and said there was a gentleman from the OPA who wanted to go over our records, and I told the bookkeeper to let him have anything he wanted.

Q. Did he do so?

A. Yes.

Q. Did Mr. Arnold ask you any questions about any matters?

A. He was in there for several months before he talked to me at all.

Q. In the meantime were the records and books of the company open to him?

A. I told them to turn everything in the world over to him.

45 Q. Did you ever have any complaint from him that anybody was not giving him information?

A. No.

Q. Did you ever have any conversation with him yourself?

A. Yes. He talked to me, I think, along about June 1943, and wanted to know who the officers and directors and so forth were at that time, and he mentioned this matter of ballast, and I said to him that I didn't think we were doing anything wrong, that certainly there wasn't any attempt to evade, ignore, or avoid any ceiling price, and that I thought we were within our rights. That was about the gist of the conversation.

Q. Did he tell you to stop shipping ballast?

A. No.

Q. At any time were you ever directed by the OPA to stop shipping ballast to the Seaboard?

A. No. Sometime in August 1948 he brought a man from Washington to our office; Mr. Bammon. I believe that is his name, and this gentleman asked me about ballast and I told him the same thing that I had told Arnold. Mr. Bammon was an engineer and I told him that our normal method of operation was by dredge or hydraulic operation, and that in order to get ballast for the Seaboard we had to rent ditching machines, load the material by crane into trucks and haul it to the plant, which of course was a far more expensive operation than our normal operation.

Q. Did you so advise the Seaboard?

A. Oh, yes.

Q. Ultimately was the ballast one dollar a ton price agreed upon between you and the Seaboard?

A. Yes.

Q. They paid it?

A. That is right.

Q. After Mr. Arnold discussed this matter with you, were you employing any certified public accountants in Miami?

A. Yes; the firm of Ring, Mahony & Arner.

Q. When they arrived at this unit cost figure did you consult them to see if they knew anything about these regulations?

A. I remember talking to Mr. Arner after this War Production Board man came in and after the Seaboard order had been turned down. I didn't know what the War Production Board regulations were until this man explained them to me. I asked Mr. Arner about the ceiling prices of Seminole, and he said at that time that he was of the opinion that we did not come within that regulation, but he would look it up. He later told me that he had made a general examination and it was his opinion that non-metallic ores did not come within that regulation.

Q. Since this suit has been brought has your company shipped any ballast to the Seaboard?

A. No.

Mr. ANDERSON. You may inquire.

Mr. GRADY. No questions. Let the record show the same motion to strike this witness' testimony.

Mr. ANDERSON. Now, this testimony is the testimony we wish to submit to your Honor in support of our application for an injunction against the OPA to restrain it from prosecuting this action and from interfering with this defendant in the sale or shipment of ballast rock at prices less than \$1.50 a ton to the Seaboard or to any other railroad. That application, your Honor, I might point out is predicated upon an assumed constitutionality of the

statute, which I do not admit, an assumed validity of the regulations, which I do not admit, an assumed reasonableness of the regulations, which I do not admit, and an assumed right of the administrator to maintain the action for treble damages. In short, the testimony that has been submitted to your Honor takes the position that notwithstanding any other defense, the Seminole Rock and Sand Company has complied with the OPA regulations, because it has demonstrated that prior to March 1942 it established a ceiling price on the kind of commodity that it shipped to the Seaboard for ballast at \$1.50 a ton, and therefore, as far as the OPA is concerned, it at all times had a right to charge anything not exceeding \$1.50 a ton. I submit to your Honor that the evidence on that point is conclusive, that there has been no violation of these regulations, even if they were valid.

Mr. GRADY. Let the record show the renewal of our objections, also, as a further ground, that all of the testimony offered here by the defendant in support of its application for an injunction against the plaintiff, is wholly immaterial and irrelevant, even apart and without prejudice to our objection predicated upon Section 204-D of the Act, and upon that basis I renew my motion to strike all of this testimony, and to the end that I might get the position of the plaintiff in this respect before the Court, I ask leave at this time to be heard briefly in support of that motion.

The COURT. I will be glad to hear you. We will recess until two o'clock.

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MIAMI, FLORIDA,

February 29, 1944, 2:00 P. M.

AFTERNOON SESSION

The COURT. Do you object if I ask you a few questions, Mr. Anderson?

Mr. ANDERSON. Not at all.

The COURT. Assume for the moment that this statute is unconstitutional and that the regulations violate the constitution, and assume that you had not violated the price ceiling—just assuming those things—couldn't you get the relief by merely defensive matter that you are entitled to? In other words, will a court of equity or any other court grant an affirmative defense when a negative defense will do just as well? Don't misunderstand me. I am not committing myself; but if this case should go to trial on the merits and you should win, wouldn't you have all the relief that you could get by an affirmative injunction?

Mr. ANDERSON. Yes; I would at that time, but in the meantime my client's business may have been ruined in the meantime, and he will certainly lose a very valuable client or customer, and the

Seaboard will not be able to get the kind of ballast it wants and needs so badly for the maintenance of its roadbed.

The COURT. I think I am correct in that principle, and I am just throwing it out so that you can make any reply to it that you wish.

Mr. ANDERSON. I think that is true. I think one of the most significant things in this case is the fact that the Price Administrator, although he prayed in his complaint for a temporary and permanent injunction, and actually served notice when the complaint was filed that he would apply to the Court on a certain date—he revoked that notice and has never yet—

The COURT. He says he is not asking for it today.

Mr. ANDERSON. Yes; and I say that that is a strike against him. That is a very significant fact, because we cannot sell our ballast. I have advised my people not to sell the ballast, and I don't think the Seaboard would buy it. Certainly if I were advising them, I would not let them buy it. My client's hands are tied and the same is true of the Seaboard. This litigation is doing untold damage to them. I agree with you. I think that if this whole thing could be tried on its merits, certainly the defendant would get every advantage it could receive by affirmative relief. Have I answered your Honor's question?

48 The COURT. Yes. Do you want to make any reply to his argument, or do you want it all to come up at one time?

Mr. ANDERSON. I was going to suggest that I proceed to do that now. That gave me some little thought during the noon hour because I realized that as a result of our application and our motions to dismiss and the Price Administrator's motions to strike parts of our answer, a good many questions had been thrown into the lap of this Court.

The COURT. Before I give you permission to take up the whole transaction, I will reserve my ruling on the motion to strike. Now does the plaintiff want to offer any evidence at this time in reply to his evidence, or do you want to stand as you are?

Mr. GRADY. We will stand as we are now, your Honor.

The COURT. All right, you may proceed with your argument, Mr. Anderson.

(Legal argument by Mr. Anderson and reply arguments by counsel for petitioner.)

The COURT. Gentlemen, I have some very decided views about what ought to be done in this case. I don't know if it can be done or not. In the first place, let me say that the statute in regard to the retirement of Judges says they may continue to perform such duties as they are willing to perform. If I had known what this case was before I started it, I would not have been "willing to perform." But I do not consider that to mean that I can take

jurisdiction of a case, and then, just because it produces questions that I do not like to decide, that I can duck them. I am of the opinion that the affirmative defenses which are set up here—that the relief desired, or equivalent relief, could all be granted under negative defenses. This case has been here a little over four months. The Court can see, without any stretch of the imagination, that it has probably interfered with the business of this defendant, and in all probability it has to some extent interfered with the business of the railroad company, and I am of the opinion that I ought to set this case down speedily for a final hearing and dispose of it on a final hearing. If counsel concur in that, I can set down at Orlando at any time during the month of March, and I can give you the whole month. I will hear from you on that suggestion. The case should not be permitted to stay here undisposed of. I think all issues could be satisfactorily disposed of on final hearing. I will give you the whole month of March, if you want it.

Mr. ANDERSON. We are willing to submit it as it stands now.

49 Mr. GRADY. As far as this plaintiff is concerned it would be perfectly agreeable to hold up everything until the final hearing during the month of March, and we are perfectly agreeable, on behalf of the plaintiff, that the case be handled under the procedure as outlined by the Court.

The COURT. I think that the ends of justice demand that this case be finally concluded as speedily as possible. My idea in making that suggestion is to the end that all of these questions may be disposed of at one time, and then if Mr. Anderson is successful, you can take me to the Court of Appeals, and then if you are successful Mr. Anderson can take it to the Court of Appeals and confirm me.

Mr. ANDERSON. We are willing for you to take the case on the record as now made. We have put in our evidence.

The COURT. But they may want to put in some evidence. I see no reason why this evidence here cannot be used at that hearing.

Mr. LICHLITER. Do you contemplate making a formal ruling of the motions at one time?

The COURT. I will defer everything until the final hearing.

Mr. LICHLITER. Of course, I want to follow any procedure that will expedite the case, consistent with an intelligent presentation of the issues of the case to your Honor.

The COURT. You may have tons of evidence that you want to put in on your bill, but this evidence that has been presented here may be considered as defensive evidence as the merits of the case.

Mr. LICHLITER. We are entirely willing to go ahead on the final hearing in March. There will be some evidence that we will of course desire to introduce on the merits of the case, and there will be certain evidence it will be necessary for us to secure from certain witnesses, and some of them we may have to do a little searching for from the standpoint of location and so on, and in making this statement I would suggest that the case be set the last week in March, at which time we will be prepared to go ahead.

Mr. ANDERSON. That is entirely agreeable. We agree to the submission of it to your Honor in Orlando subject to the plaintiff's right to put in any evidence it desires.

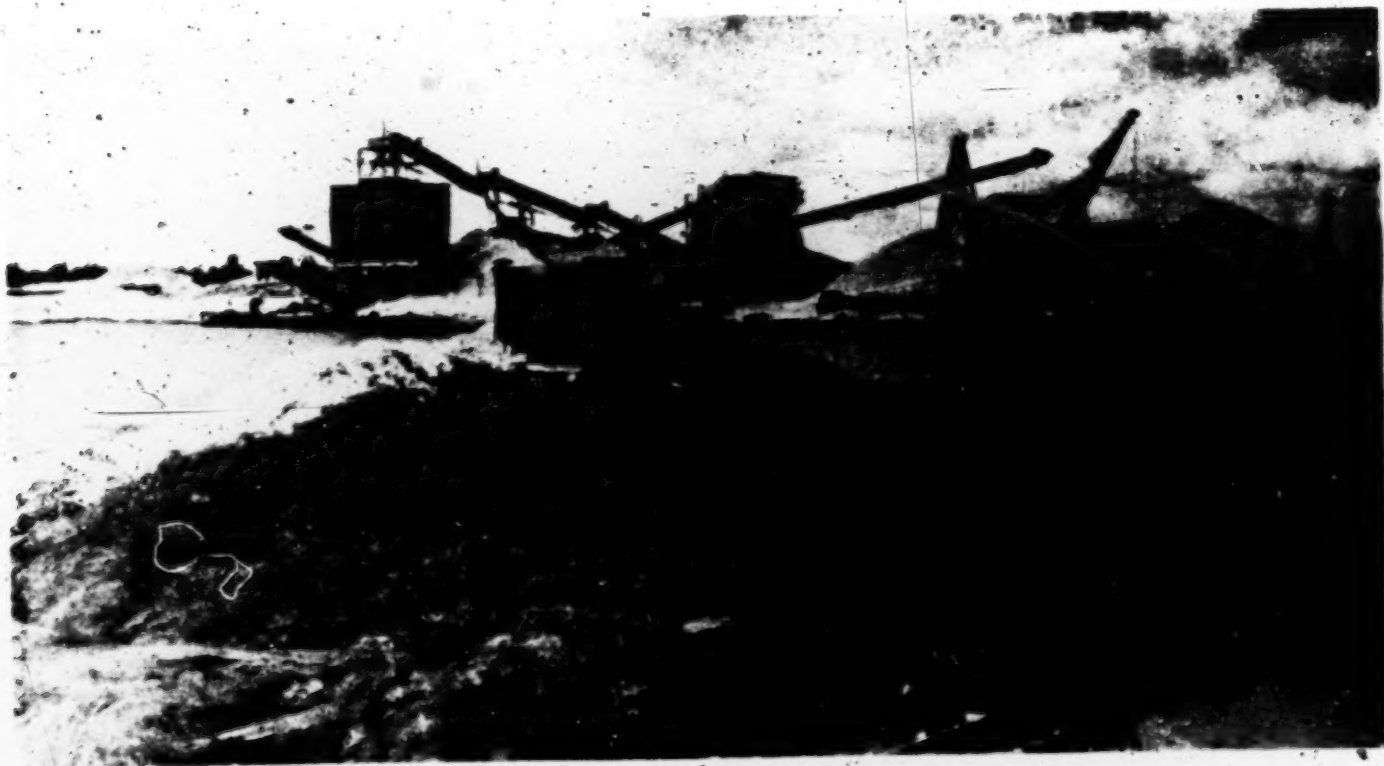
(There upon the hearing was adjourned at Miami, to be taken up in Orlando, Florida, on March 27, 1944, with the agreement between Court and counsel that the Official Court Reporter of the Miami Division will report the proceedings in Orlando.)

50 STATE OF FLORIDA,
County of Dade.

I hereby certify that the foregoing transcript, pages 1 to 40, inclusive, is a true and correct transcript of the proceedings had and testimony taken in the above-entitled cause before the Hon. Alexander Akerman, District Judge, at Miami, Florida, on February 28-29, 1944.

Dated at Miami, Florida, this 22nd day of May 1944.

H. E. COLMAN,
Official Court Reporter.



DEFENDANT'S EXHIBIT NO. 1

48 CHESTER BOWLES VS. SENIORITY FOR N. SAND CO.



DEFENDANT'S EXHIBIT NO. 2

53 *Defendant's Exhibit F.*

Defendant's Exhibit F is attached to the Deposition of James L. Brown, a witness for defendant, as Exhibit 6 for Identification, and appears at R. 81, infra.

Defendant's Exhibit G

POSTAL TELEGRAPH

JEA243 TWS GOVT PAID 3 MINS

1942 Aug 24 PM 3 49.

PEN JACKSONVILLE FLO 24 333P

SEMINOLE ROCK & SAND COMPANY

(MIAMI FLO)

REPHONE CONVERSATION AUGUST TWENTYFOUR MR RANKIN AND BAILEY OF THIS OFFICE RELATIVE FURNISHING SIX OR MORE ADDITIONAL CARS OF ROCK DAILY FOR BOCCARATON PROJECT. REQUEST THESE CARS BE MADE AVAILABLE WITHOUT NECESSITY OF INVOKING PRIORITY REGULATIONS RELATIVE DELIVERY MATERIALS. INFORM THIS OFFICE OF ACTION TAKEN. JOH-1680
A G. VINEY US ENGINEERS.

(42)

Def. Exhibit G. Bowles Adm. O. P. A., vs. Seminole Rock & Sand. Filed in Evidence Feb. 29, 1944. Edwin R. Williams, Clerk. #896-11-Civ.

On February 28, 1944, Deposition of James L. Brown, a witness on behalf of defendant, was filed in words and figures as follows to wit:

The deposition of James L. Brown, of 1338 Monterey Avenue, Norfolk, Virginia, was taken before me, a Notary Public for the State of Florida at Large, on the 15th day of February 1944, at Room 627, Ingraham Building, Miami, County of Dade, State of Florida, pursuant to the annexed notice, on behalf of the Defendant in the above-entitled action, pending in the above-named court. Phares N. Hiatt, Esq., of Miami, County of Dade, State of Florida, appeared as attorney for the plaintiff, and Robert H. Anderson, Esq., and Alfred L. McCarthy, Esq., of the firm of Loftin, Anderson, Scott, McCarthy & Preston, of Miami, County of Dade, State of Florida, appeared as attorneys for the defendant.

Mr. ANDERSON. It is stipulated between counsel that objections to any question or answer may be interposed at any time on any grounds without the necessity of including them in the record of the deposition, with equal force as though they had been interposed at the time the question was propounded, and in the event such objections are sustained the testimony given in response to such questions will be eliminated.

JAMES L. BROWN, being by me first duly sworn to tell the whole truth, as hereinafter certified, testified as follows:

Direct examination by Mr. ANDERSON:

Q. What is your name?

A. James L. Brown.

Q. Where do you live, Mr. Brown?

A. Norfolk, Virginia.

Q. You are in Miami temporarily?

A. For a few days.

Q. You don't know how long you will be here?

A. No; but not very long.

Q. Not over a couple days?

A. Two days.

Q. You don't expect to be here when this case is tried?

A. No; sir.

Q. How long have you lived in Norfolk?

A. Twenty-five years.

Q. What is your business?

A. I am Purchasing Agent for the Seaboard Airline Railway Company.

Q. How long have you been with the Seaboard?

A. About 24 years.

Q. How long have you been purchasing agent?

A. A little over 10 years—since 1933.

Q. Now, in your capacity as purchasing agent for the Seaboard, have you had occasion to purchase ballast?

A. Oh, yes; I purchase all the ballast for the Railroad.

Q. The main line of the railroad runs from Miami to Richmond, Virginia; is that correct?

A. Yes, sir; that is correct.

Q. And the ballast is used on the main line?

A. Oh, yes.

Q. Since Pearl Harbor has the Seaboard been engaged in transporting troops?

A. Oh, yes; we have transported a considerable number of troops as well as ammunition and equipment.

Q. And supplies?

A. Yes.

Q. In and out of Miami?

A. I am not in a position to say just through what districts, but I would say all over the railroad, from Miami to Richmond and Birmingham and the River Junction.

55 Q. As a railroad man, is ballast necessary for the safe maintenance of the roadbed?

A. Absolutely.

Q. Now, in making your purchases of ballast, from what quarries have you had occasion to purchase in Florida?

A. Oh, we have purchased from the Seminole—

Q. There at Miami?

A. At Miami.

Q. What others?

A. We have purchased from Camp.

Q. Where is that—Brooksville?

A. Brooksville. And we have purchased from Maule.

Q. Where is that—Ojus?

A. No; it is not Ojus; in the neighborhood of Ojus, but on the Seaboard.

Q. On the East Coast, isn't it?

A. No. Ojus is on the East Coast, but the ballast we have been getting is on the Seaboard side.

Q. How is it gotten over there?

A. Transported by truck and loaded on cars. Then we bought some from Tiger Tail, and also MacDonald Construction Company.

Q. Where are they?

A. Tiger Tail is in Miami, I believe, and MacDonald—I cannot recall, but I think he is over in the Brooksville territory.

Q. In making your purchases of ballast, do you endeavor to purchase from quarries in the vicinity of the places where the ballast is going to be used?

A. That has been our practice since ever I have been with the railroad.

Q. Why?

A. Well, you buy it cheaper in the long run. Even if you pay a higher price for it, you have less car demurrage, you have less haul, you can handle your work trains much more expeditiously, and then you have a ballast in the territory that sort of mixes in with the materials in the territory on the track.

Q. Now, carrying that thought out a little bit further, in territory where other materials and stone and rock are available, do you use it for ballast; for instance, do you use gravel and slag?

A. Oh, yes; in certain territories—in the Virginia Division, where crushed rock is available, we use crushed rock, and in other territory—in Monroe there, we use gravel, because that is adjacent to the point of use.

Q. Do you use slag?

56 A. And then we will run down as far as Atlanta, and from Atlanta west we will use slag?

Q. Why?

A. For the same reason. We like to use the Florida rock in Florida. We would not want to haul slag from Birmingham to use it in Florida, and for the same reason we use material from the vicinity where it is to be used in order to keep our cost down.

Q. For economical reasons?

A. Absolutely.

Q. And does that result in your using a number of kinds of material as ballast?

A. Oh, yes, yes.

Q. Does that also influence the quality of the material you use?

A. Oh, I would say so; yes.

Q. Now, since you have been purchasing agent, purchasing ballast for the Seaboard, have you bought from the Seminole Rock and Sand Company of Miami?

A. Oh, yes; we have bought quite considerable tonnages from them.

Q. Have you found their product satisfactory as ballast?

A. Yes.

Q. How does the product of the Seminole compare with other grades of ballast that you have purchased?

A. Well, in our opinion, it is satisfactory ballast and meets our specifications, while some of the others might be a little inferior.

Q. And has it proved uniformly satisfactory?

A. To the best of my knowledge; yes.

Q. How does the Seminole compare in volume of ballast that you have purchased in the past with other quarries in Florida?

A. I would say that they have been, up to 1941, pretty well distributed, but in 1942 we got considerable more from Seminole than we got from anyone else.

Q. At that time was it or not your main source of supply in South Florida?

A. It was at that particular time.

Q. Well now, just for the record, suppose you tell us the number of tons of ballast you purchased from all sources in Florida in 1940, 1941, and 1942.

A. Well, in the Florida rock in 1940 we purchased 87,145 tons, and in 1941, 139,225, and in 1942, 167,113. In 1943—

Q. Well, I don't—

57 A. That is not complete, because we haven't been able to get deliveries on what we had placed on order, so we got considerably less in 1943, because we were unable to procure it, then we would have normally gotten.

Q. I see. Now, of that tonnage, how much of it did you get from Seminole Rock and Sand Company?

A. In 1942, 339,000 tons.

Q. All right.

A. In 1941, 60,600.

Q. All right.

A. In 1942, 339,000 tons.

Q. Three hundred and thirty-nine—I understood you to say you got 267 altogether.

A. Wait a minute. That is wrong. It is 239.

Q. Two hundred and thirty-nine?

A. Yes.

Q. Do you remember when the Seminole Rock and Sand Company commenced its operations in Miami?

A. We commenced negotiating with them for ballast around the latter part of 1933, and as I recall it, their operations began in 1934.

Q. And do you remember what price you paid them at that time?

A. Sixty cents a ton.

Q. Sixty cents a ton in 1934?

A. Yes, sir.

Q. Now, how long did you continue to pay that price?

A. We paid that price on up until 1942.

Q. Then in that period of time were prices of ballast and other similar materials increasing?

A. At some points it did increase; at others it remained pretty well stationary.

Q. And when the price was changed from 60 cents, what did you pay for it after that time?

A. The first change we made was to 75 cents.

Q. And then did you pay any more after that?

A. Later on we paid 85 cents.

Q. And any more after that?

A. And later on we paid a dollar.

Q. Now, what was the difference in quality between the ballast for which you ultimately paid a dollar and that for which you originally paid 60 cents?

A. Well, due to the advancement in the methods of preparing and processing ballast, we naturally get a better grade of ballast today than we did when the operation began and probably in the first few years of the operation.

58 Q. Do you know whether or not that is the view of your engineering department?

A. It definitely is.

Q. And your maintenance of way department?

A. Yes, sir.

Q. Mr. Brown, did you make any arrangement with the Seminole Rock and Sand Company to provide a stock pile of ballast for immediate use?

A. We did that way back—that was in the original negotiations when our General Manager at that time arranged with them to get

this operation going, and he made arrangements at that time so that they would maintain a stock pile of anywhere from a minimum of five to a maximum of ten thousand tons, available for prompt use to protect our needs in case of hurricane, flood and so forth.

Q. And was that a convenience to the Seaboard?

A. Very much so.

Q. Now, in the Spring and Summer of 1942, to what extent did the Seaboard rely upon the Seminole Rock and Sand Company to furnish ballast?

A. For this territory we had to rely on them very much; in fact, we had considerable trouble trying to procure any ballast whatsoever for this territory until finally the Seminole people made some arrangements by which they finally came and said they would be willing to take the order and furnish the ballast; that they were in a position to produce it.

Q. About March 3, 1943, did you order some ballast from the Seminole?

A. That is correct.

Q. I hand you an instrument which I will ask you to say if that is your purchase order.

A. That is.

Mr. ANDERSON. I offer it in evidence.

Mr. HAITT. I think the stipulation covers the objection.

Mr. ANDERSON. I agree that the stipulation covers any objection to that.

(The document referred to was thereupon marked "Defendant's Exhibit No. 1," is attached hereto and appears at P. 77, infra.)

By Mr. ANDERSON:

Q. Now, after you placed your purchase order which is marked "Defendant's Exhibit No. 1," did you receive a letter, a copy of which I hand you, dated March 6, 1942, from the Seminole?

A. This is it; yes, sir; I recognize that.

Q. Where is the original of that letter?

59 A. In my files in Norfolk.

Q. In Norfolk?

A. Yes.

Mr. ANDERSON. I offer it in evidence.

(The document referred to was thereupon marked "Defendant's Exhibit No. 2," is attached hereto and appears at P. 78, infra.)

By Mr. ANDERSON:

Q. In reply to that letter of March 6th, marked "Defendant's Exhibit No. 2," did you address a letter dated March 9, 1942, to the Seminole?

A. Yes.

Q. Is that the original of it?

A. That is.

Mr. ANDERSON. I offer it in evidence.

(The letter referred to was thereupon marked "Defendant's Exhibit No. 3," is attached hereto and appears at P. 79, infra.)

By Mr. ANDERSON:

Q. Now, Mr. Brown, in the early part of July 1942, did you put a further order for ballast with the Seminole Rock and Sand Company?

A. When the Seminole Rock and Sand Company advised me that they were in a position to take care of our requirements we placed an order with them on July 7th, I recall.

Q. I hand you what purports to be a copy of a telegram addressed to you by the Seminole, dated July 11th, and I ask you if you received the original of that.

A. Yes; I did.

Q. Where is the original?

A. In my files in Norfolk.

Q. In Norfolk?

A. Yes, sir.

Mr. ANDERSON. I offer it in evidence.

(The document referred to was thereupon marked "Defendant's Exhibit No. 4," is attached hereto and appears at P. 79, infra.)

Q. Now, I hand you a communication dated July 23, 1942, which I shall ask you to examine. Do you know from what source that letter came?

A. That was issued by our Traffic Department.

Q. What is the name of the official?

A. George B. Rice, Chief Freight Traffic Officer.

Q. And was he Chief Freight Traffic Officer at the time that letter was written?

A. Oh, yes.

60 Q. Does it purport to be a genuine communication coming from his office?

A. Oh, I would say so; definitely.

Q. I call your attention to the date of that letter and to the last paragraph that refers to ballast contract, and I ask you if prior to that time any representatives of the Seminole Rock and Sand Company were conducting any negotiations with you relative to the price of ballast?

A. We were, of course, negotiating in order to get the price trend on this order, and my understanding was, while I have never seen this letter, that such negotiations as are pointed out here were going on, and that they were in conjunction with the price set-up as well, as one proposition.

Q. I realize that that letter didn't come from your department. I am just showing it to you to fix in your mind the date, and ask you if those negotiations for the price of the ballast were going on at that time.

A. Oh, yes, yes; definitely.

Mr. ANDERSON. I think perhaps I will just ask that that be marked for identification.

(The letter referred to was, thereupon marked "Defendant's Exhibit No. 5" for identification, is attached hereto and appears at P. 80, infra.)

Q. Now, who on behalf of the Seminole Rock and Sand Company was negotiating with you; what is the name of the man?

A. Mr. J. W. Sexton.

Q. Is he the gentleman in this room that I point out?

A. Yes, sir.

Q. Is he representing the Seminole Rock and Sand Company?

A. Yes, sir.

Q. At what price did he propose to sell the ballast to you at that time?

A. It was a little later on than this letter that he finally came to Norfolk and offered to sell it to us at \$1.10 a ton.

Q. Were you undergoing negotiations at the time of this communication?

A. Yes; I would say yes.

Q. And had you been since the order of July 3rd?

A. Yes, yes.

Q. Now, what price did you propose to buy the ballast after your order of July 3rd?

A. July 3rd? Is that the third or seventh?

Q. It should have been the 7th, but the order that this telegram is in reply to.

A. July 7th.

61 Q. My error. What price did you propose?

A. We forwarded them the order at 75 cents a ton.

Q. And did they accept that order?

A. No, sir.

Q. And did you later agree on a price?

A. We did.

A. And what was the price you agreed on?

A. A dollar.

Q. Was that a satisfactory price to you?

A. Oh, yes.

Q. And a reasonable price?

A. I would say so; yes.

Q. At what prices were other quarries in Florida selling ballast to you at that time?

A. Well, I was not getting any ballast from anybody at that time in Florida.

Q. When had you last bought ballast in Florida?

A. We did get some in 1942 from Camp; some at a dollar; some at \$1.10 in 1942. We got some from Maule at 95 cents, and a little from MacDonald at a dollar.

Q. How did the Maule ballast compare with the Seminole?

A. As to price?

Q. No, as to quality.

A. Well, my understanding is that the Maule product is not purchased by us for exactly the same purpose as the Seminole ballast; it is used for surfacing purposes rather than for tamping under the ties and supporting the railroad. The Seminole ballast is tamped and supports the ties, and therefore the railroad, which is a different type or character of work.

Q. Is it purchased according to the same specifications?

A. No, sir.

Q. Now, can it be used for the purpose of putting under the ties?

A. It may be used, but it would not be an economical operation in the minds of our engineers.

Q. When Mr. Sexton called on you and began the negotiations for a new price of ballast which culminated in the agreement to pay a dollar, did he give you reasons why he wanted to charge that price?

A. Oh, he set forth certain reasons that he had, in order to justify the increase in price; yes, sir.

Q. Do you recall if he had a memorandum that looked like this which he showed you at that time?

A. Yes, sir; he showed me that in Norfolk.

62 Mr. ANDERSON. I ask that that be marked for identification.

(The document referred to was thereupon marked "Defendant's Exhibit No. 6" for identification, is attached hereto and appears at P. 81, infra.)

Q. Did Mr. Sexton advance the reasons set forth in this memorandum to you at that time for the increased price of the ballast?

A. Yes; he explained that he had to open up additional property at the quarry in order to produce this ballast, and without doing that he would not be able to get the tonnage out.

Q. Did he tell you why he had to open up additional quarries?

A. Yes, sir; he stated that his plant was entirely taken up with governmental or service operations, taking his entire out his normal quarry, and therefore, in order to take care of as he had to expand to do it.

Q. And did he represent to you that the costs set forth in this memorandum were the necessary costs of expanding the plant to meet your needs?

A. He stated it was a necessary cost to produce the ballast. I would not say it would cover the entire cost of expanding the plant.

Q. Based on your own experience, not only in the purchase of ballast, but in the purchase of other materials for the railroad, was it a fact that costs were increasing?

A. Definitely so.

Q. And did you believe that the representations that Mr. Sexton made to you were true?

A. Well, we had no cause to doubt them.

Q. Mr. Brown, if the Seaboard is unable to obtain ballast from the source of supply now available or that was available at the Seminole quarry, what will be the consequence?

A. Well, it will just be a very expensive proposition for the Seaboard if we have to replace that ballast from some other source.

Q. Based upon your experience, would it cost you more than a dollar a ton?

A. Yes, sir.

Q. Would it present any other difficulties, such as transportation?

A. It certainly would; it would tie up your cars, for one thing; it would make it very difficult to handle your work trains for another, and in general just be a very great expense.

63 Q. In your experience, do different grades of ballast sell for different prices?

A. Oh, yes.

Q. As far as the Seaboard is concerned, is it willing to continue to purchase Seminole's ballast at the price of a dollar a ton?

A. Yes, sir; I would be very anxious to get some right now.

Q. And does it need the ballast for its main line railroad?

A. Very definitely; absolutely.

Mr. ANDERSON, You may inquire.

Cross-examination by Mr. HIATT:

Q. Mr. Brown, when did you come down here?

A. Last night.

Q. Last night?

A. Yes, sir.

Q. Did you come down for the purpose of this deposition?

A. I came down to give my wife a few days relief and at the time, of course, we are taking the deposition at the same time.

Q. You knew before you left home that you were going to have this deposition taken here?

A. I assume I was.

Q. On what did you base that assumption?

A. I had had some talk about it.

Q. You had had some talk and correspondence about it?

A. Uh-huh. I don't think I saw any correspondence, but I had some talk about it. I won't say I had definite advice.

Q. Mr. Brown, do you recall writing a letter to the Seminole on or about July 3rd, in which you told them that under the provisions of the general maximum price regulations, issued by the Office of Price Administration under date of April 28, 1942, that you were not allowed to pay Seminole prices which exceed the highest price for which they sold or offered to sell the same or similar commodity during March 1942, and in addition you advised that in order to meet the requirements of these regulations that you requested Seminole acknowledge to you that the price on any orders which you have heretofore placed with Seminole and which have been or will be shipped subsequent to May 10, 1942, did not or would not exceed the highest price for which they sold or offered to sell the same or similar commodity during March 1942?

A. I do. That was a letter that in order to try to protect the Railroad we could not attempt to take care of every individual case, so what we did, we took all the concerns with whom we were doing business, or at least the bulk of them, as many as we could figure on, and we sent them all that same letter, the idea being it would protect us in accepting prices or bids from other concerns. In other words, put the burden on the other chap. The wording might have been a little more broad than that, in that it was an attempt to protect us and assure the furnishing of the materials, complying insofar as we were concerned, with the rules and regulations of the OPA, which of course were subject to adjustment, and a great many of them, as you know, have been adjusted since that date, and the real intent of the letter was to protect us in regard to the rules and regulations as they might be amended from time to time.

Q. But you understood that before the price can be raised there had to be an adjustment allowed?

A. That is just the point I am trying to make. I could not attempt, buying about sixty or seventy thousand items, to ascertain that any figure submitted to me had been an allowed adjustment; otherwise I would have had the railroad tied up in no time, see?

Q. Do you recall that you received a letter dated July 20, 1942, addressed to you and signed by Seminole Rock and Sand Company, R. G. Lassiter, President, which was received shortly after July 20, 1942, in which he acknowledged receipt of your letter

of July 11, 1942, and advised you that the highest price at which Seminole had sold ballast in 1942 was 75 cents per ton?

A. I recall that; yes.

Q. Then from your letter and that response you knew definitely that the ceiling could not be over 75 cents?

A. No, sir; I didn't know that.

Q. You didn't know that?

A. No, because I will tell you the reason why. If you will check up your Federal Register which was issued every week—during the week I glanced through it and you will see price adjustments lined up there by the scores on some of these items.

Q. Did you make it a point to see if Seminole was listed?

A. I cannot pick them all out. Man, if I did that I would not do anything else; in fact, I would not have time to do that; would not be able to do my job.

Q. But looking at this third paragraph, it would not take you long to see what the ceiling was on ballast, would it?

A. How am I going to determine?

Q. It says so in the letter. You said 75 cents was the highest price they could charge.

65 A. I don't know about that. I don't know whether Mr. Lassiter had gotten an adjustment or not.

Q. Aren't you protected on the price of 75 cents over the signature of Mr. LASSITER?

A. Well, that is a legal question that I would hesitate to answer myself.

Q. Did you petition—or did the Seminole petition the Office of Price Administration for an increase in price on this?

A. I didn't petition; I don't know whether Seminole did or not.

Q. You don't know whether they did or not?

A. No; I would not know.

Q. Until you did find out that they had petitioned and had been granted an increase, would you pay over 75 cents a ton?

A. Well, based on the evidence that you have got, we did; assuming that that letter would protect us.

Q. Then you did pay over the ceiling that you said was charged for that in March 1942?

A. We did.

Q. How long have you been using this class of ballast according to the ballast specifications on the Seaboard?

A. Our specification was issued in 1936—December 1936.

Q. Do you use any of the Seminole ballast out of Florida?

A. I could not answer that definite, but I doubt it.

Q. How long have you been using ballast on the roadbed of the Seaboard in Florida?

A. Ten years.

Q. What ballast did you use before that?

A. I could not answer that. I would have to get the information from my office.

Q. You don't know whether they used any ballast?

A. Oh, they are bound to have used some kind of ballast, but what kind I could not say at this minute.

Q. You don't know the specifications?

A. It was not on that specification prior to 1936.

Q. It was not?

A. No. See, that specification became effective December 1936, so really the specification ballast would not really be received until 1937.

Q. Then you don't know what the specification was before 1937?

A. I don't know that we had any real specification.

Q. Do you know where you got it?

A. Beg pardon?

Q. Do you know where you got ballast before 1937?

66 A. I haven't got that record with me. I can furnish it.

Q. How much ballast do you use monthly on your road?

A. You cannot base railroad requirements on the monthly basis. Here's what happens. For instance, if we place 115,000 tons, the order is placed subject to call by the division engineer. Now, he decides to do that next week; he is going to ballast a certain section of line. Then he may take out fifty or sixty thousand tons of ballast if he can get it out that fast in one month, and then not take out any ballast in the next month. So there is no average figure.

Q. Not even taking into consideration the whole year there is not any average per year?

A. Oh, you can figure out a simple average on what it would amount to, but it would not be in line with the facts and the years.

Q. How do you account for the great increase in the ballast used in 1942 over 1940?

A. Well, I think you will find that railroad conditions have greatly changed during this period of time. There has been increased speeds, the streamlined trains; there has been treble the business handled, for one thing, and naturally your use of ballast, as well as other materials, has to increase accordingly.

Q. The increase was from the beginning of 1940 to 1942?

A. That is right.

Q. How do you account for the great decrease of ballast in 1941?

A. 1941?

Q. Yes.

A. Well, there was not really any decrease in 1941 on the system as a whole; there may have been in the Florida territory, but while you decrease in Florida you may increase somewhere else.

Q. Why was the decrease in Florida?

A. Because we went up to Virginia and did more work in Virginia that we did in Florida. It fluctuates.

Q. I didn't understand you to say it fluctuates. You said because of travel wartime conditions it increased.

A. That is what necessitated it. You take in 1941, for instance, our total purchases on the Seaboard in the territory you are talking about, only from Miami to Richmond, was 530,000 tons of ballast, 139,000 tons of which came out of your South Florida; see?

Q. But isn't it a fact that the increase in travel because of the military was greater in 1942 than in either 1941 or 1943?

A. I am not quite familiar with that.

67 Q. Now, why does ballast produced in South Florida mix better with the roadbeds of Florida than ballast produced outside of Florida?

A. That was only an assumption on my part. I am not an engineer. That may not be so. I was just assuming that.

Q. Do you have the specification for this ballast?

A. In 1942?

Q. All along.

A. Since 1936—December 1936.

Q. It has been the same since 1936?

A. Yes.

Q. What was the difference between your rock and the rock of these other rock pits—I mean the rock of the Seminole and the rock furnished by the other rock pits?

A. I have to say this again, that I am not an engineer, but our engineering department felt that it is suitable for our needs; it is preferable to some.

Q. Now, when you buy rock from the Seminole here or Maule, does your engineers test that ballast before it is put on the road beds here in Florida?

A. I don't know but we have the privilege under the specifications of doing so. Whether they do it or not, I don't know.

Q. Then when you, without knowing whether Seminole petitioned and got an increase in the price of rock above what they said the ceiling price was of 75 cents, paid them more, you didn't know that you were paying above the ceiling?

A. No, sir.

Q. You didn't know that?

A. No, sir.

Q. You stated that when this price began to increase that, among other things, one of the reasons for it was that there was an improvement in the ballast itself. How do you know that?

A. I didn't say that exactly. I said this, that the ballast that we get today or during recent years is a better grade or better proc-

essed ballast than the ballast we got when this pit was originally opened.

Q. When was that pit originally opened?

A. About 1930—end of 1933, or beginning of 1934.

Q. You learned about that improvement through whom?

A. Well, that was just through general knowledge, because you know that the plants have put in machinery which they did not have when they opened the pit, and they are in a position to process it better today than they were in 1933 and 1934.

Q. You said that Seminole kept a stock pile at their pit here in Dade County with several thousand tons on hand for you all the time.

68 A. That was the arrangement we made with them, and they have kept it. I don't know whether they have it there today or not on account of conditions as they are today, but they did keep it for years and years.

Q. Do you know whether they had it during the first three or four months of 1942?

A. No, sir.

Q. What trouble did you have, if any, during 1942 and 1943 in getting specification ballast for your Florida tracks?

A. Well, I had an order on my desk—this particular order we are talking about, and I could not get anyone to take it. I tried everywhere and it laid on my desk for two or three months until Mr. Sexton negotiated this thing and arranged to enlarge his plant so that he could furnish it, and that order for ballast would have been placed somewhere else in the meantime if I could have gotten it placed.

Q. There has been offered in evidence here Defendant's Exhibit No. 1, which is an order for rock ballast, and I will haul it to you and ask you to note on the bottom the price where it has been stricken out in pencil, 60 cents, and in pencil inserted 75 cents.

A. That is right.

Q. Was that received by you with that change made?

A. No, sir; that—we didn't make the change; that change was made by the Seminole Rock and Sand Company on the authority of the letter which I gave him, due to negotiations on account of his increased cost, due to labor and equipment, machinery and so forth, and he negotiated and we agreed to give him the 15-cent increase at that time.

Q. And did you know that the Seminole Rock and Sand Company made that further change?

A. I assume they did. I didn't. And they had the original order in their file. I didn't have it.

Q. If the order is dated March 3, 1942, what was the purpose of the letter dated March 6, 1942, which is Defendant's Exhibit 2, asking that this correction and an increase be allowed?

A. Due to the facts stated in the letter—the increased cost of labor and materials and supplies.

Q. This letter is three days after the order. Isn't it a fact that you received this order and they asked you to correct it by that letter?

A. They received the order and asked us to give them authority to increase it, which we did by the following exhibit, I think you will find.

69 Q. Now, was any of this rock delivered on this order to you in March 1942?

A. No; I don't think so.

Q. Was any rock delivered to you by Seminole for ballast to the Seaboard in March 1942?

A. Not that I recall.

Q. No ballast delivered to the Seaboard in March 1942?

A. I would have to check my record. I could not tell you today; right here, I doubt it, though.

Q. On this order here, which is Exhibit No. 1, is that the first time that you paid over 60 cents for ballast?

A. Yes, sir.

Q. And none of that was delivered in March 1942?

A. No, sir.

Q. Then if any ballast was delivered to you in March 1942, by Seminole, you paid 60 cents for it; is that correct?

A. Yes, sir.

Q. When did this ballast start to improve in quality?

A. I cannot answer that, because I have never been in the quarry myself.

Q. You said that the price increased and gave as the reason for it, among others, that it was because of the improved quality of the ballast.

A. Well, that is just a practical matter. If they have been running a ballast pit for ten years and have not improved the quality of ballast from the day they opened the pit, there is something far wrong with them.

Q. In relating to specifications, what, if anything, is the difference between the Seminole ballast and the ballast furnished by these other people that you testified about, including Maule?

A. I am not prepared to say, because as I said, I am not an engineer.

Q. As far as you know then, there is not any difference?

A. The only thing I can tell you on that is, it is the feeling of our engineers that there is some difference, and due to the fact

that they prefer to use the Seminole product for ballast to support the track while they use the Maule product to surface it.

Q. You don't know whether or not they use Maule to support the track or not, do you?

A. They may have at times, but it is a very uneconomical proposition, in their minds.

Q. Do you know why they use it—

A. No, sir.

70 Q. In different places?

A. No, sir.

Q. You stated also the increase in price was because the Seminole had expanded their production.

A. Expanded their plant so that they could produce it over and above the output of their plant, which was taken up, as I was advised, by the Army and Navy.

Q. Couldn't you have purchased from other rock pits without causing Seminole to increase their production by expanding their plant?

A. Not at that time, sir; not at that time.

Q. Why not?

A. That was the only reason we had to wait and place this order with them. You will see we placed the order on July 7th, and the negotiations started, and we were not able to place that order finally until October. In the meantime I had been trying every way possible to place that order for ballast, and until Sexton negotiated and come along and said that he could expand his plant so that he could produce it, I could not get the ballast.

Q. Well, why did you stand for an increase in cost to you caused by an expansion program on the part of Seminole rather than to go to someone who could produce it without that increased cost, and get it cheaper?

A. I didn't understand it was entirely due to the expansion, but partially, because an expansion is capital cost, as well as increased cost for operation, and it was the increased cost of operations that we were taking up; not the increased cost of expansion.

Q. I understood you to testify on direct examination that that was part of it. Do you know today that you can get ballast rock which will come up to the specifications for considerably less than one dollar?

A. I would like to find it.

Q. You saw that ad of Seminole, dated on or about March 3, 1942, stating that they were going to discontinue production of rock and sand?

A. Something in the Miami papers here? I believe I did see that.

Q. If they had discontinued that, what would you have done for ballast?

A. I cannot answer that, because we would have had to have made some other arrangements. There is no question about that, but just what we would have done, I don't know.

Q. Did you have a conference with Mr. Sexton here in September 1942, in regards to the SAL ballast requirements?

A. I had a conversation with Mr. Sexton on September 18th, I think it was, 1942, when he showed me that exhibit.

Q. Wasn't that conference arranged between you and Mr. Sexton because the Seaboard had needed ballast badly, and they had shipped you approximately 582 cars in June and had dropped to around 24 or 25 cars in September 1942?

A. I don't recall that detail. I was out of town at the time, and I got a wire from people that Mr. Sexton was anxious to have a conference with me in Norfolk, and that he would be there on the 17th. Well, I got home on the 18th and we had this conference, and that was the time he showed me the exhibit, and he requested a price of \$1.10 for the ballast. Well, I told him that I would not pay him any dollar and ten cents. However, to leave his proposition with me so that I could handle it with my superiors to see what we had to do about it, because the ballast situation was serious with us at that time.

Q. But you didn't accuse or charge the Seminole Rock and Sand with interfering with the safety of your roadbed or hindering the war effort, on the part of your Railroad, did you?

A. If we would not have continued to be able to press this order and get ballast, that would have happened, because we had to get ballast somewhere, and I could not get it.

Q. You would have accused them if that had continued; is that right?

A. I don't know whether we would be in a position to accuse them of that.

Q. At that conference with Mr. Sexton was not discussion had or mention made regarding the ceiling price on the rock ballast?

A. Not that I recall; no, sir.

Q. Weren't you informed in November 1943, of several quarries where you could get ballast?

A. I may have been.

Q. And informed by the Office of Price Administration in Washington?

A. Yes, sir.

Q. Did you verify their suggestions?

A. We did. We tried some of the points, but of course the increased cost and so forth, we were in hopes of getting them straightened out and get the ballast we wanted on the most economical basis.

Q. What was the price quoted by these other places?

A. I don't know.

72 Q. Was it over one dollar?

A. You talk about a lower price. Now, you may get a lower price, see, but these lower prices that you get—you take Maule; I would take that ballast from Maule at 95 cents, but that is on the Florida East Coast, and it would cost 40 cents to get it to the Seaboard; that would make it \$1.35 a ton, and in addition to the cost and waste of cars, because you cannot control the use of work train cars on a foreign line like you can on your own.

Q. You mean it cost you 40 cents a ton—

A. From Ojus to Hialeah it is 40 cents a ton. So you probably had in mind 95 cents, but I got the freight rate right here. I thought it was very high—40 cents a ton, Ojus to Hialeah.

Q. Who figured that?

A. My traffic representative in my office sent me the check on the tariffs.

Q. How many tons per car?

A. They run around, I should imagine, 45 or 50 tons; something like that.

Q. It would cost from twenty to twenty-five dollars a car to take it from Ojus to Hialeah? Is that right?

A. Yes.

Q. What was the previous price quoted to you by Maule on ballast rock?

A. I think that is the only price I got. The last ballast we got from Maule was in 1942 at 95 cents.

Q. You don't remember when?

A. Not the month—in 1942. However, that was not the ballast we are talking about from Ojus. That ballast from Ojus is all right, and as far as I know will compare favorably with Seminole, but the ballast we have been getting which comes from the Seaboard side of the track is a different quality ballast, and that is the ballast that we are talking about; not this Ojus rock.

Q. Have you inquired lately of Maule for ballast?

A. I got a telegram here from them right now, on February 10th. He said: "Rewire. Appreciate inquiry 55 cars ballast, but temporarily too heavily booked with Government orders to ship immediately. Will advise you our position in two weeks. Thanks."

Q. What did you answer?

A. That is his answer to me. I didn't have any answer. I wired him on the 8th of February: "Wire collect best price and delivery 55 cars of ballast"—watch this—"similar to that furnished to Florida East Coast, giving point of shipment." See he did not distinguish between the Ojust rock and this rock on the Seaboard, because this we wanted to use for ballast and not for surfacing.

Q. That is the last you heard from them, eh?

A. That is the last we heard and that was on the 10th of this month.

Q. You didn't wire him on the 11th putting an order in there, did you?

A. I was not there. I have been away. They may have done that since I have been down this way.

Q. Is someone there authorized to sign your name?

A. Oh, yes; sure.

Q. If they did place an order for 3,000 tons on the 11th, and the same was accepted on the 12th, and the order was signed J. L. Brown, Seaboard Airline Railway, and was accepted later, you don't know anything about it, eh?

A. No, sir; that is the first I heard of it. If I had to leave my office to wait for me to get back, I am afraid the railroad would be stopped.

Q. I know, but someone in authority takes your place?

A. Oh, yes; I have an assistant who is authorized to act in my absence.

Q. Then if such a telegram was received by Maule Industries placing an order, signed J. L. Brown, and the order was accepted, the acceptance was sent by Maule Industries—

Mr. ANDERSON. I would like to see those telegrams, and let the witness see them.

Mr. HIATT. O. K.

The WITNESS. This wire here is not dated. Oh, yes; February 11th. Well, wasn't there a wire previous to that that was wired Maule?

By Mr. HIATT:

Q. Well, I think you were testifying about some wires you got.

A. The wire I sent was on the 8th, and he wired me on the 10th, and said they could not do anything. They evidently handled it with them since I left, and he said he could furnish 3,000 tons of ballast, and it appears authentic to me. I don't think there is any doubt about that, but I can easily check it up and ascertain whether it is so.

Q. Then if it is correct you can get ballast some place else, can't you?

A. At about \$1.35 a ton against a dollar, plus all the excess costs of handling.

Q. I know, but—

74 A. And we are a poor road in receivership. We need all the money we can get and save.

Q. That increase, though, is caused by your haul, isn't it?

A. No; it is caused by our freight rate that we have got to pay to the Florida East Coast of 40 cents.

Q. What was the price to you by Maule Industries?

A. Ninety-five cents, it had been.

Q. Wasn't that the price allowed Maule by their proper petition to the Office of Price Administration for an increase?

A. I don't know anything about that.

Q. Do you know whether or not Mr. Sexton here is connected in any way with the Seaboard Airline Railway?

A. He is not connected at the present time with the Seaboard Airline Railway, as far as I know of.

Q. Was he during the year 1943 and 1942?

A. I don't know the exact period, but he has been connected with them on more than one occasion.

Q. Was he connected with them in any way during the time you were purchasing rock from Seminole Rock and Sand Company?

A. He may have been in previous years, but not since this came up.

Q. What official capacity, if any, does Mr. R. J. Lassiter have with the Seaboard Airline Railway?

A. None that I know of.

Q. Has he ever had any official connection that you know of?

A. No, sir.

Mr. HIATT. That is all.

Redirect examination by Mr. ANDERSON:

Q. Mr. Brown, as I understand your cross-examination, the increase in the tonnage of ballast in 1942 over 1940 was due to the increased railroad traffic?

A. Due to increased railroad traffic and the movement of troops, war material and supplies, and the necessity of the fixing of your tracks to take care of the high speeds at which you have to run in order to carry the business you are handling.

Q. Now, as I also understand you, you don't know if any of the Seminole ballast was delivered to the Seaboard in March 1942?

A. I don't know, but I don't think it was.

Q. I also understand that the Maule ballast was not ordered under specification?

A. That is true.

Q. Now, this exchange of telegrams refers to native rock, Class A, SAL specifications. What is native rock?

75 A. I don't know where the term originated from, but it has been called native rock ever since I can remember handling it. Now, native rock, in accordance with the specification 304, is different to the native rock that we have bought from the Maule Products Company from the Seaboard side.

Q. And what is the difference?

A. One meets the specifications and the other does not, as far as I know.

Q. And which meets the specifications?

A. The Seminole rock—the Seminole Rock or the Ojus rock; either one.

Q. But that Ojus rock is not the Maule native rock from which you call the Seaboard side?

A. Not from the Seaboard side; that is right.

Q. And in any event if you buy from Maule you have to pay a haulage charge of 40 cents a ton to get it from his quarry to the Seaboard tracks?

A. That is correct.

Q. And that makes the 95-cent rock cost \$1.35?

A. Yes.

Q. Do you know any place where you can get rock conforming to your specifications delivered to the Seaboard for less than a dollar?

A. No, sir; not today.

Q. Have you had prices quoted by a man named Puinchon, in this region?

A. I think we have had at some time; I don't know how recent it was, but I believe his price was \$1.30.

Q. How did it happen that you were informed by the OPA in November 1943, of other quarries where you could get rock?

A. I went to Washington and contacted the OPA and explained their difficulties, and they advised me at that time that there were several other points and quarries where we could buy rock.

Q. Did your difficulties grow out of this suit that prevented the Seminole from selling you rock?

A. Oh, definitely so.

Q. And the OPA told you that there were other quarries where you could get rock?

A. That is correct.

Q. And could you find any rock in any of those other quarries?

A. Well, I could not say just how strenuously we handled it at that time; because we were in hopes of getting this thing straightened out and getting the rock that we wanted at the low cost.

76 Q. Did you succeed in getting any rock from any other quarries?

A. No, sir.

Q. Have you bought any other rock since this litigation started for less than one dollar a ton delivered to you?

A. Not ballast. We have bought the Maule surfacing material at 95 cents on the Seaboard.

Q. But you had to pay a 45-cent freight charge?

A. No, no; this was a surfacing, not ballast.

Q. That was not ordered according to your specifications?

A. No, sir.

Mr. ANDERSON. I think that is all.

Re-cross-examination by Mr. HIATT:

Q. Mr. Brown, you speak of the rock on the Seaboard side—is that what you said—was inferior to the other?

A. Yes.

Q. Then this wire of the 11th, to which your name is signed—had you referred to that on the Seaboard side in your wire, wouldn't you have specified it in the wire?

A. No; you see this classification 304 knocks the Seaboard side out.

Q. It does?

A. Because it will not be touched by the specifications.

Q. Wait a minute. Because the Seaboard side won't meet that number there, eh?

A. Yes.

Q. And that was the number that was ordered?

A. Yes.

Q. What is the number?

A. 304.

Q. That is the higher grade Maule rock?

A. That is right.

Q. Now, state, if you know, what, if any, difference there is between the specifications for railroad ballast rock between the Seaboard Airline Railway and the Florida East Coast Railway?

A. Well I don't know what the Florida East Coast Railway's specifications are, in the first place, sir, and in the second place, I am not prepared to discuss technicalities as to the qualities of the rock or ballast or any other thing, because that is not my job; you would have to get an engineer to tell you that.

Q. If they are the same or if there is a difference, you don't know?

A. I will go this far—

77 Q. Answer the question first, so we will get it in the record. You don't know if there is any difference?

A. No, sir.

Mr. ANDERSON. Now answer and finish what you started to say.

The WITNESS. The difference between the rock on the Florida East Coast side and on the Seaboard side, the rock on the Florida East Coast side, as I understand, is under water, and evidently the water has some chemical action which does something to that rock which the Seaboard rock does not get, because it is not under the water, and does not have that chemical action, or whatever it may be, but I am not sufficiently advised to tell you.

Mr. HIATT. That is all.

Mr. ANDERSON. Do you waive the signature of the witness?

Mr. HIATT. Yes. It is agreed between the counsel for the plaintiff and counsel for the defendant that the copy of the telegram of February 11, 1944, from J. L. Brown, Seaboard Airline Railway, to Maule Industries, and a copy of telegram dated February 12, 1944, to J. L. Brown, Purchasing Agent, Seaboard Airline Railway, Norfolk, Virginia, from Maule Industries, be marked for identification.

The documents referred to were thereupon marked "Plaintiff's Exhibits A and B," respectively, are attached hereto and appear at R. 82, infra.

(Thereupon the deposition was concluded.)

Defendant's Exhibit No. 1

SEABOARD AIR LINE RAILWAY

Reqn. Number NF-22153. Order No. P-221546-C-33.

NORFOLK, VA.,

March 3rd, 1942, *encl.*

SEMINOLE ROCK & SAND COMPANY, *Miami, Fla.*

Quantity 28,500 tons; Stock Number 17-40; Description, Class A Miami Rock Ballast, Spec. N. W. & S.-304.

To be loaded in SAL Hopper Bottom Cars.

Delivery—To be shipped as called for by Division Engineer.

Price \$0.75 Per Net Ton.

F. O. B., Cars SAL Rwy. Tracks.

Delivery, See Above.

Terms, Please advise.

Route, Via SAL Rwy.

78 Mark and ship to Receivers of Seaboard Air Line Railway. Care J. R. Traphoner, Jacksonville, Fla. Sec. 1.
Order P-221546-C-33 NF-22153.

J. L. BROWN,

Purchasing Agent.

Defendant's Exhibit No. 2

MARCH 6, 1942.

Mr. J. L. BROWN,

Purchasing Agent, Seaboard Air Line Ry., Norfolk, Va.

DEAR MR. BROWN: With reference to your wire of Mar. 4th and confirmation dated March 3rd, Order No. P-221546-C-33 covering 28,500 tons of ballast.

We are enclosing herewith a notice as exhibited in the Miami Daily News March 3rd, which is self explanatory and under instructions that the writer has, we cannot accept any further orders. However, the writer has taken this matter up with other members of this organization with a view of handling this particular order for you.

Due to the increase in the cost of labor and repair parts, our production costs have advanced considerably and of course it is not profitable for us to produce material at the present level of prices and for this reason we would be unable to fill the above mentioned order at 0.60 per ton. However, we have decided if you so desire that we will run the 28,500 tons required by you, as a special run at 0.75 per ton price in order to take care of this order and at this figure will, of course, guarantee delivery of the required tonnage per day to the best of our ability.

Please advise us by return mail if you so desire to have us handle the order at the increased price so that we may be able to make the necessary arrangements to produce same for you.

Yours very truly,

SEMINOLE ROCK & SAND CO.,
By J. R. RANKIN, Sales Mgr.

(Ink Memo:)
Wire & Letter.
Mch 9.
O. K.

79

Defendant's Exhibit No. 3

SEABOARD AIR LINE RAILWAY

NORFOLK, VIRGINIA, March 9th, 1942.

P-221546-C-26

SEMINOLE ROCK AND SAND COMPANY, Miami, Florida.

GENTLEMEN: Confirming my wire to you today, authorizing price of 75 cents per ton instead of 60 cents per ton, as shown on our order of the above number.

Will you please advise promptly what we may expect as to delivery, considering, of course, our wire of March 4th, requesting that deliveries begin the latter part of April or the first of May, completing at the rate of 30 cars per day.

Yours truly,

J. L. BROWN,
Purchasing Agent.

Defendant's Exhibit No. 4

[Copy]

WESTERN UNION

Charge to the account of Seminole Rock & Sand Co., 1114 Congress Bldg.

J. L. BROWN,
SEABOARD AIRLINE RAILWAY,
NORFOLK, VIRGINIA.

RE YOUR ORDER NO. P-724015-C-33 FOR 115,000 TONS BALLAST SORRY WE CANNOT SEE OUR WAY CLEAR TO ACCEPT THIS ORDER UNLESS SOME ARRANGEMENT IS MADE WHEREBY ALL SWITCHING ON OUR SIDING IS DONE BY YOUR ENGINES. OUR PRESENT FACILITIES INADEQUATE AND MUCH TOO UNDEPENDABLE TO PERMIT US TO GUARANTEE DELIVERIES. ALSO OUR PRESENT ORDER WITH YOU WILL REQUIRE APPROXIMATELY SIXTY DAYS TO COMPLETE AND FROM INFORMATION GATHERED LOCALLY WE HAVE NO ASSURANCE THAT SEABOARD TRACKS WILL BE ON THEIR PRESENT LOCATION OR JUST WHERE THEY WILL BE LOCATED SIXTY DAYS HENCE. WE REGRET OUR INABILITY TO SERVE YOU.

(Signed) SEMINOLE ROCK & SAND CO.

DAY LETTER.
7-11-42.

80

Defendant's Exhibit No. 5

For Identification

SEABOARD AIR LINE RAILWAY

TRAFFIC DEPARTMENT

NORFOLK, VA., July 23, 1942.

43958-D

SEMINOLE ROCK & SAND CO., *Miami, Fla.*

GENTLEMEN: Referring to the conference your Messrs. Benson and Sexton had with me in my office here on Tuesday, July 21st, respecting the operation of your Miami tracks.

This is to confirm the understandings reached in this conference as follows:

That we would operate your tracks to the point where your present double-end run-around track is located (approximately 6,000 feet from connection with our line) under the following conditions:

1. That you would put your tracks in satisfactory shape to us to permit of our operation.

2. That the double-end run-around track would be extended by you sufficiently in length to take care of the business involved.

3. That we would not be obligated to continue operation of the tracks when and if the loads handled amount to less than ten per day. This, of course, contemplates loads yielding to us road haul revenue.

It was understood that empties would be placed by us on that part of the main spur paralleling the double-end track and that loads for delivery to us would be placed by you on the double-end track, or vice-versa, as may be worked out by our local representatives.

The understanding was that Mr. Benson or Mr. Sexton would let us know when you want our representative to meet your representative on the ground for the purpose of advising your people what it will be necessary for you to do to put these tracks in satisfactory condition to permit of our operation.

Messrs. Benson and Sexton also mentioned to me the ballast contract when I explained that this should be treated entirely separately from the track operation matter and it was understood that they would take up later for an appointment with
81 our Purchasing Agent, Mr. Brown, to discuss this matter of ballast contract.

Yours very truly,

G. B. RICE,
Chief Freight Traffic Officer.

Defendant's Exhibit No. 6

For Identification

[Copy]

SEMINOLE ROCK & SAND CO.

MIAMI, FLA., September 1, 1942.

Extra Cost-Increasing Capacity to Take Care of Seaboard Ballast

With present total production going to high priority Army and Navy projects, following is estimated cost of increasing present capacity to produce 150,000 tons ballast in next five months:

1. Approximately 50,000 tons of above tonnage can be secured by putting additional power on the dredge at an estimated cost of \$12,000 which, charging only one-half to ballast production, would be extra cost of ----- \$8,000

2. Remaining 100,000 tons increase can only be obtained by cutting up top rick with specially built ditching machines, excavating from water and piling to drain by dragline, loading with shovel and hauling to plant by truck at estimated cost per c. y. as follows:

	Per ton
Ditching Machine cutting-----	\$0.30
Dragline excavating-----	.08
Shovel Loading trucks-----	.08
Trucks hauling to plant-----	.25

.71

As present cost of operating dredge delivering material to plant is \$0.20 per ton, this is an increase in cost of \$0.51 per C. Y. or on 100,000 tons-----

\$51,000

Total extra cost producing additional 150,000 tons Ballast----- 57,000
Or \$0.38 per ton.

(Dictated over 'phone to Raleigh office, Pratt, Lassiter & Watkins—F. Moose and J. W. Sexton on line.)

(S.) B. BENSON.

Filed in evidence Exhibit "F" of Defendant 7/28/44.
BB:h

82

Plaintiff's Exhibit A for Identification

WESTERN UNION

NORFOLK VA
FEB 11 1944
MAULE INDUSTRIES

ENTER #6-244017 THREE THOUSAND TONS NATIVE MIAMI ROCK CLASS A SAL SPECIFICATION 304 FOR DELIVERY WHEN CALLED FOR BY DIVISION ENGINEER LOAD IN HOPPER BOTTOM CARS CON-SIGN E M SUTTON ROADMASTER INDIANTOWN FLORIDA AC-KNOWLEDGE ROUTE VIA SAL

J. L. BROWN
SEABOARD AIRLINE RAILWAY

Plaintiff's Exhibit B for Identification

WESTERN UNION

OJUS FLA
FEB 12 1944

J L BROWN
PURCHASING AGENT
SEABOARD AIRLINE RAILWAY
NORFOLK VA

REWIRE THANKS FOR ORDER THREE THOUSAND TON CLASS A BALLAST WE ACCEPT AND CAN LOAD IMMEDIATELY HOPPER CARS ON FLORIDA EAST COAST RAILWAY FOR TRANSFER AT WEST PALM BEACH OR MIAMI TO INDIANTOWN. PRICE SAME AS LAST ORDER. PLEASE FORWARD SHIPPING INSTRUCTIONS.

MAULE INDUSTRIES

Sent thru Hollywood, Fla., Western Union message carried by W. T. Mears left Ojus, 4:10 PM.

On January 25, 1944, the deposition of Earl L. Smith, on behalf of Defendant, was filed in words and figures as follows, to wit:

In the District Court of the United States for the Southern District of Florida

No. 896-M-Civil

CHESTER BOWLES, AS ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION, PLAINTIFF

vs.

SEMINOLE ROCK AND SAND COMPANY, A CORPORATION, DEFENDANT

The deposition of Earl L. Smith, of 1920 Southwest First Street, City of Miami, State of Florida, was taken before me, a Notary Public for the State of Florida at Large, on the 17th day of January 1944, at 627 Ingraham Building, Miami, County of Dade, State of Florida, pursuant to the annexed notice and letter (the taking of said deposition having been postponed from day to day, from the 13th day of January 1944), on behalf of the Defendant in the above-entitled action, pending in the above-named court: Phares N. Hiatt, Esq., of Miami, County of Dade, State of Florida, appeared at attorney for the Plaintiff, and Robert H. Anderson, Esq., and Alfred L. McCarthy, Esq., of the firm of Loftin, Anderson, Scott, McCarthy & Preston, of Miami, County of Dade, State of Florida, appeared as attorney for the Defendant.

Mr. ANDERSON. I want to file that notice and a copy of that letter changing the time for taking the deposition. The notice called for Friday, January 13th, and at the request of Mr. Hiatt it was postponed until today.

EARL L. SMITH, being by me first duly sworn to tell the whole truth, as hereinafter certified, testified as follows:

Direct examination by Mr. ANDERSON:

Q. Mr. Smith, your name is Earl Smith?

A. Earl L. Smith; yes, sir.

Q. Where do you live?

A. 1920 Southwest First Street, Miami, Florida.

Q. How long have you lived in Miami?

A. About eight months—nine months.

Q. How old a man are you?

A. I am 45.

Q. What is your business?

A. Well, I work with the Government. I am a construction superintendent at the present time.

Q. What department of the Government are you with?

A. U. S. Engineers.

Q. And what is the official name of the position that you hold with them?

A. Superintendent of construction.

Q. How long have you been with the United States Engineers?

A. Since September 1939.

Q. Now, is your work with the United States Engineers such as they send you about from place to place from time to time?

A. Yes, sir.

Q. Pretty regularly?

A. Very regularly.

84 Q. As a matter of fact, do you know where you are going to be from one day to the next?

A. Well, no, I don't. One day to the next I might say yes, but from one week to the next I would not.

Q. So you don't know whether you are going to be here when this case is tried or not?

A. No, I don't.

Q. As a matter of fact, haven't you just gotten back from South America?

A. The 22nd or 23rd of December.

Q. December 1943, you returned from a trip to South America?

A. Yes, sir.

Q. Were you away on business for the United States Engineers?

A. Yes, sir.

Q. How long were you in South America on that trip?

A. About six and a half months.

Q. You may have to go again, for all you know?

A. For all I know; yes.

Q. Well, your movements are very uncertain; is that it?

A. That is right.

Q. Do you know where the plant of the Seminole Rock & Sand Company is in Dade County, Florida?

A. Yes, sir.

Q. Are you familiar with that plant?

A. Yes, sir.

Q. When did you first become familiar with it?

A. Well, the first time I was out to the Seminole plant, I think it was January 1942.

Q. On what business were you?

A. I went out there to inspect some rock.

Q. For whom?

A. For the U. S. Engineers. The rock was to be bought by the J. B. Loftus Company, and shipped to Stuart, Florida.

Q. Do you know what it was to be used for in Stuart?

A. The construction of a dam and spillway across the St. Lucy Canal, about six or eight miles west of Stuart, Florida.

Q. Was Loftus the contractor that had the contract for building the dam?

A. Yes, sir.

Q. You were not working for him?

A. No, sir.

Q. You were working for the United States Engineers.

A. I was working for the United States Engineers.

85 Q. And the United States Engineers had supervision of the job?

A. Supervision of the job; yes, sir.

Q. For what purpose were you sent out there?

A. Well now, wait a minute. Under the construction supervision of the U. S. Engineers, but they did not supervise the construction in the way that you might say they furnished foreman and superintendents. They inspected the construction of the work.

Mr. HIATT. Pardon me a minute, Mr. Anderson.

Mr. ANDERSON. Yes.

Mr. HIATT. Our objections and motions on this testimony, are they to be interposed here or later before the Court?

Mr. ANDERSON. I am perfectly willing to stipulate with you that they may be interposed at any time and on any grounds, whenever you see fit. We agree that you may interpose any objection that you see fit to any question or answer.

Mr. HIATT. And such testimony as given, if the Court rules the objection is good, it will be eliminated from the testimony.

Mr. ANDERSON. Of course.

Mr. HIATT. Will you put that in the deposition?

Mr. ANDERSON. I so stipulate.

By Mr. ANDERSON:

Q. Now, you were sent by the Engineers to inspect some rock at Seminole Sand & Rock Company's plant in Dade County in connection with the Loftus work on the St. Lucy Canal dam.

A. Yes, sir.

Q. Did you make the inspection of that rock?

A. Yes, sir; in January, I think, we inspected about—oh, ten or fifteen hundred tons of rock, and I forget the number of samples and how much we shipped out of that stock pile that they had at that time, but I think we shipped around, either three or

five bargeloads; but we did inspect a considerable amount of rock.

Q. Did you inspect more than was shipped to the Loftus job at St. Lucy?

A. Oh, yes. At that time the U. S. Engineers were doubtful whether the rock from the Seminole plant would pass the specifications that were required in the construction of this dam. They did send a fellow down from Jacksonville at the same time, I don't know his name, but we spent one whole day going over the plant and stock piles and we made several tests—we must have made 25 or 30 tests of the rock.

86 Q. This was in January 1942?

A. Yes, sir.

Q. And that was a stock pile of about how much rock?

A. Well, the rock that I was shipping from I would say was between ten and fifteen hundred tons.

Q. Now, how much of that stock pile was actually shipped to the Loftus job?

A. I would say between three and five hundred tons.

Q. Now, what happened to the remainder of the rock that was in the stock pile when you inspected it in January 1942?

A. Well, we just left it there.

Q. You left it there. Did you have the specifications that were contained in the contract for the Loftus job at St. Lucy?

A. Yes, sir; I had a copy of the contract with me.

Q. Do you remember what the specifications were that the rock had to come up to by test?

A. Well, I do remember the specific gravity that was required. The specific gravity that was required was 2.46, but I don't remember the specifications required on the gradation of the rock.

Q. You mean by that what percentage of it was required to pass the screen?

A. Pass the screen; yes, sir.

Q. Would you know approximately what it would be?

A. Yes; I would know approximately what it would be. It was two grades of rock shipped. One was from Screen No. 4 to 1 inch, and the requirements on that rock was from 95 percent to 100 percent passing the 1-inch grade. Thirty percent to 70 percent passing the one-half inch screen, and nothing but 5 percent passing the No. 4 screen. Now, it has been a long time since I have seen that.

Q. Now, that was the small-sized rock, wasn't it?

A. Yes.

Q. Now, how about the larger rock; do you remember that?

A. Yes; I believe that was 95 to 100 percent passing the 2-inch screen; 30 to 70 percent passing the one and one-half inch screen,

and 0 to 15 percent passing the 1-inch screen. Now, it has been a long time since I have seen those specifications.

Q. But that is your best recollection?

A. That is my best recollection.

Q. Could you say that those figures which you have given were substantially correct?

A. Yes; I would say that they were substantially correct.

87 Q. Now, Mr. Smith, you recall that specific gravity specification was 2.46?

A. Yes, sir.

Q. Your recollection about that is definite, is it?

A. I believe so; it is within one one hundredths; it might have been 2.45, but I believe it was 2.46.

Q. But you knew at the time what the specification was?

A. Yes, sir; I had a copy of them right in front of me at the time.

Q. Suppose you tell us what you mean by the "specific gravity" was 2.45?

A. Well, it is the weight; the specific gravity of anything is weight, in a comparison to the weight of water. The weight of water is one, and 2.46 is 2.46 times the weight of water.

Q. So if rock is required to have a specific gravity of 2.46, that means that a certain quantity of rock will weigh 2.46 times the same size of water; is that right?

A. That is right; yes.

Q. It is 2.46 times heavier than water.

A. Than water; yes, sir.

Q. Now, you had to make tests according to the methods of the United States Engineers, to determine whether this rock came up to these specifications?

A. Yes, sir. We tested for apparent specific gravity.

Q. And did you find that the rock did meet the specifications?

A. Yes, sir; I tested a lot of rock out there that did not pass the specifications, but all the rock that I shipped to the Government passed the specifications, and it passed by a good margin. Now, I used this system of testing. I took about a 25-pound sample out of a car or a barge of rock. Then I would run the gradation on this rock to see that it passed the gradation; then I ran a specific gravity test and I would use from five to ten samples; and I would take an average of those samples and I believe that the rock would run from 2.42 to 2.60, but the average was around 2.50 or 2.52 for the samples.

Q. And all that was shipped met those specifications?

A. Yes, sir.

Q. And was there some in addition to that that met those specifications?

A. Yes—oh, yes.

Q. Some left over that was not shipped?

A. Yes, sir.

Q. Mr., Smith, was the St. Lucy job delayed for any reason?

88 A. Yes; there were several delays on the St. Lucy job. I don't remember at the time what caused them, but I know there were several delays on the job.

Q. So that when did you next go back to the Seminole plant after your January 1942 visit?

A. In August.

Q. 1942?

A. Yes, sir; right around the first week of August. It was somewhere between the third and fifth.

Q. Well, that is close enough. Now, was the balance that you left there in that stock pile in January still there?

A. No, sir.

Q. It had gone?

A. It had gone.

Q. You don't know what had happened to it?

A. No, sir.

Q. How long did you stay there now on your second trip?

A. About three months. I stayed through the last week—into the last week of October—August, September, October.

Q. You stayed there steadily for about three months?

A. Yes, sir; every day, with the exception of Sunday, and some Sundays I went out there.

Q. And were you engaged in the same business then of inspecting and testing the rock for the St. Lucy job?

A. Yes, sir.

Q. And did you make tests to see if it came up to the same specifications as you did in January?

A. Yes, sir.

Q. The specifications had not been changed?

A. No, sir. Every shipment that went out to the St. Lucy job I inspected, and I inspected the other rock—not all of it, but I kept mighty close check on the rock that was being put out at the plant, because I wanted to know what kind of rock was coming out all the time. I didn't want any mixed with mine that was below the specific gravity of 2.46.

Q. Now, all the rock that you shipped out to the St. Lucy job came up to the specifications, didn't it?

A. Yes, sir.

Q. Now, while you were there in those three months in the late Summer and Fall of 1942, do you know whether, or not, Seminole shipped any rock to the Seaboard?

A. Yes, I know they shipped some.

Q. How do you know that?

A. Well, we were buying on the same rating as the Seaboard; we had an A-1-J rating, and it was a scramble between me and the Seaboard to see who got the rock.

89. Q. You had the same priority?

A. We had the same priority, and which was very low down the line. The fact is it was the lowest that could be shipped at that time.

Q. And naturally you were trying to get as much rock for your job as you could?

A. They told me to get that rock if it was possible; so that is what I was trying to do.

Q. Now, did you have occasion to test any of the rock that the Seaboard got?

A. Yes, sir; I tested quite a bit of the rock that the Seaboard got. The fact is I kept a close check on all the rock that went through the plant from one-inch to two-inch. That is where our shortage of work was at, in large rock, and I know that at one time the Seaboard—at least they shipped some of my rock to the Seaboard and I had to get some of the Seaboard's rock to ship to our job, so I inspected both rocks.

Q. Did the rock that they shipped to the Seaboard—did you inspect it with the same tests that you did the Loftus Rock?

A. Yes, sir.

Q. And did it come up to the specifications?

A. Well, not all of it. It run around 2.42 to around 2.50, I guess, and we figured the weight in there where—me and Mr. Bunnell here, where that the rock would be interchangeable.

Q. How did you figure that?

A. Well, they got two crushers out there, a big crusher and a smaller crusher; the smaller crusher is an impact crusher, and we figured if we would run so much of this rock through the smaller impact crusher it would knock out a lot of soft rock; therefore it would increase the specific gravity of the rock that we wanted, the larger rock, and in doing that we increased—I imagine we run about 30 percent of the rock through the impact.

Q. And did that increase the specific gravity?

A. That increased the specific gravity. The fact is, after doing that I could not tell much difference between the rock that we were shipping then and the rock we were shipping previous to that; the specific gravity; it was lower, but you would get samples that would run a little bit lower, you know, and others would run the same thing. If I remember correctly we run a bunch of tests on this rock that was run directly through the big crusher, and the specific gravity averaged around 2.42 on it, and after running it through

the impact crusher all the rock would pass the specific gravity test on specification.

Q. Of 2.46.

90 A. Of 2.46; and I think those averaged around 2.52 too.

Q. Now, who is Mr. Bunnell?

A. He was superintendent for the Seminole Rock Company.

Q. At the plant?

A. Yes, sir.

Q. And you suggested to him that it would increase the specific gravity if part of the rock was run through the impact crusher?

A. Well, we run some tests to see if it would.

Q. And did it?

A. Oh, yes.

Q. Now then, after you did that was the rock that was sold to the Seaboard and the rock that was sold to Loftus the same rock?

A. Yes, sir; interchangeable.

Q. It was interchangeable?

A. Yes. Now, wait a minute here. The rock that would measure from one to two inches was the same rock.

Q. That is what I am talking about.

A. Now, I don't think they shipped the Seaboard any of the smaller rock, because they had plenty of that. It was satisfied with the amount they had on that.

Q. You were competing with the Seaboard for the larger size rock?

A. That is right.

Q. And that was interchangeable after you started running part of it through the impact crusher?

A. Yes; sir.

Q. And the same rock was being sold to the Seaboard that was being sold to Loftus?

A. That is right.

Q. Did it come from the same source—the same deposit?

A. Yes.

Q. It had to, didn't it?

A. It had to. It was being dredged—they were using the same dredge and the same pipe line. At that time they were using everything possible to get rock out at that plant; they were using drag-lines and ditching machines and hauling it in trucks.

Q. But it all came from the same source, didn't it?

A. It all came from the same source.

Q. So that the rock that the Seaboard got and the rock that Loftus got came from the same source.

A. Yes; and everybody else that was getting rock at that time.

91 Q. And after you started putting it through the impact crusher it came up to the same specifications?

A. Yes.

Q. And it was interchangeable.

A. It was interchangeable.

Q. Now, as a matter of fact, did you get for your job any rock that they crushed for the Seaboard?

A. Yes, sir. I remember one time in particular—now, I cannot give you any date or anything, but the Seaboard pulled out some of my rock that had been inspected, and carried it off, and Mr. Bunnell told me it was three cars of rock down on the side that belonged to the Seaboard that I could have if it would pass, so I got a nigger and we went down there and got about 75 pounds of this rock, about a 25-pound sample out of each car, and carried it down to the laboratory. I had a little laboratory fixed up in one of the warehouses out at the plant, and run those samples, and it all passed, and I accepted it and shipped it on up to Loftus.

Q. And that was rock that was intended to be used by the Seaboard?

A. Yes; the Seaboard got my rock and I had to take theirs or do without, so I went out and inspected it and it passed the specifications.

Q. Now, the rock that they got of yours, had that passed the specifications?

A. Yes, sir; it had already been sampled.

Q. Mr. Smith, how long have you been in the rock business?

A. Well, the first samples that I tested was in 1926. At that time I was working for the Putnam Road Department.

Q. Putnam County, Florida?

A. Yes; Putnam County, Florida. The next rock job—now, this was not a big job down in Putnam County. It was building some curb and gutter, and we didn't run specific gravity on that rock at all down there, but we did test it for gradation, the size of the rock, and that was on a curb and gutter job from Crescent City, Florida, out to, I guess you would call it Crescent City Junction, out to the railroad depot, for Crescent City, which is about two and a half or three miles. That was in 1927.

Q. You have been inspecting and testing rock since that time?

A. Well, off and on since that time.

Q. Have you ever been in the rock business for yourself?

A. No; never been the rock business for myself.

Q. Who have you done inspection work for—inspection of rock now, I am talking about?

92 A. Well, I inspected rock for the Putnam County Road Department, and the Marion County Road Department, and

the United States Engineers; and in 1940, I believe, I spent about six months at Brooksville, inspecting rock for the Government.

Q. Is there a large rock company at Brooksville?

A. Yes, there is. I was with the Camp Concrete Rock Company, and I was up there again, I think that was in the latter part of 1941—December 1941. But I was working at that time with the United States Engineers.

Mr. ANDERSON. You may inquire.

Cross-examination by Mr. HIATT;

Q. Are you an engineer, Mr. Smith?

A. No, sir. When I was doing that inspection I had a rating with the Government as an engineering aid—civil.

Q. When you were in South America recently, were you there—I believe you testified you were there for the United States Engineers.

A. Yes, sir; I left here the 4th day of June 1943, and returned the 22nd or 23rd of December 1943.

Q. What kind of work were you doing down there?

A. I was on maintenance, with the Post Engineer most of the time. I would say five months and a half of that time was up—

Q. Have you any assignment definite at this time to return to South America with the United States Engineers?

A. No, sir; I have no assignment whatever.

Q. Are you now with the United States Engineers?

A. I am now with the United States Engineers and I am on sick leave.

Q. Has your employment been terminated?

A. No, sir.

Q. It has not?

A. No, sir.

Q. Were you subpoenaed to come here?

A. No, sir.

Q. Did you have permission of your superior to come here and testify?

A. No, sir; I haven't asked anybody about it.

Q. About how many cubic yards of rock was inspected by you and shipped to this Loftus job at the St. Lucy locks?

A. Well, I don't know exactly. I would say between three thousand and five thousand tons.

Q. How many cubic yards would that be?

A. Well, roughly figuring, we figured about a ton to the yard, but it goes more than that. I should say it would go twenty-five to twenty-eight hundred pounds, a cubic yard.

How about that, Bunnell?

Mr. BUNNELL. I think it would run in the neighborhood of around twenty-three or twenty-four.

The WITNESS. So roughly speaking it would be right around, figuring a ton to a yard—that is the way they always figure it.

By Mr. HIATT:

Q. And how many tons were shipped up there?

A. I would say between three hundred and five hundred—three thousand to five thousand tons.

Q. About one ton, or maybe a little over, to a cubic yard?

A. Yes.

Q. Now, how much of that rock that was shipped to the St. Lucy job was Class A, and how much of it was Class B—gradation?

A. Now, let's see. I don't remember it was Class A and Class B, and I don't remember which was Class A and Class B rock, because we spoke of it as grade one inch to two-inch at the time.

Q. Let's call that Class B.

A. The specifications graded as A and B.

Q. How much of that from one inch to two-inch?

A. Two-inch to one inch I would say was right around 50 percent.

Q. The other 50 percent was the one inch to one-quarter inch?

A. Yes, sir. I won't be sure of that, because I will tell you why. The combine of the shipment—they specify a combine too, in there, and in making out my report I remember combining the rock, but it seemed to me like it was five or six or maybe 12 carloads or bargeloads more of the smaller rock shipped out than there was the big ones. Now, I don't remember that for sure.

Q. It would be a little over 50 percent of the smaller?

A. It would be between 50 and 60 percent of the smaller rock.

Q. Do you know of your own knowledge during the time that you were there if any of this smaller size, one inch to one-quarter inch, was delivered to the Seaboard for ballast?

A. No, sir; not as I know of.

Q. Did you test any of this Seaboard ballast rock?

A. Yes, sir; I tested a lot of it.

Q. That was later delivered to the Seaboard?

A. Yes, sir. Now, let me tell you. I went through there, but I don't think this makes any difference in writing it down, 94 but we run some tests on it to see how we could get a large amount of the large rock, see? That was what we were running the shortage in, and coming out of the pit and going through the big crusher, the specific gravity was slightly under that required to be acceptable by the Engineers. Is that clear?

Q. Yes.

A. Well, we just had to get some more big rock, and we figured that we would run part of it through the impact crusher, and the part going through the impact crusher knocking out the soft rock would increase the specific gravity of the whole rock, the rock

that was from one inch to two and a half. Now, we were allowed a certain amount to be retained on the two-inch screens, and quite a few of the tests I made out there it would retain on the two-inch screens, but any test that I shipped would pass the specifications; it would increase the specific gravity by running it through the impact crusher, and average from 2.42 to 2.52. I remember telling Mr. Bunnell we could cut down the amount running it through the impact crusher if it would do any good.

Q. Did you pass any rock for the St. Lucy job with a specific gravity of 2.42?

A. No, sir.

Q. Did you pass any rock for the St. Lucy job which was larger than two-inch?

A. Yes, sir. I think sometimes we would have as much as four or five percent that would fail to pass the two-inch test. Now, I will tell you what I did. I left a copy with the Seminole Rock Company of my reports. I made out reports for the Clewiston office and reports for the Stuart office of the U. S. Engineers, and I had a copy for my own self, and when I left I just left them for the Seminole Rock Company, and they have that set of specifications, and if they got them now I would like to just take a glance over them, if you don't mind, to refresh myself.

Q. Let me ask you this question. How much of the Seaboard ballast rock did you test?

A. Well now, I don't know. I tested a mighty lot of rock in there between—

Q. What equipment did you use to make that test?

A. Used the same equipment that we used for the testing of the rock by the United States Engineers.

Q. Who did that belong to?

A. That belonged to the United States Engineers.

Q. Who employed you to test the Seaboard ballast rock?

A. Nobody employed me to test the rock.

95 Q. Weren't you being paid by the Government for the time that you were testing this Seaboard rock, and you were using the Government equipment to do it with?

A. No. I was out there to test our rock, and while the rock—I had to get some of the Seaboard rock at sometimes, and Seaboard got some of mine, and I was testing the rock for our benefit, not for the Seaboard, because I didn't care whether the Seaboard got any rock or not.

Q. Did you take the Seaboard ballast that you tested?

A. Yes, sir; and I know of one particular instance where I taken three cars of rock—I believe it was four cars of rock that was assigned to the Seaboard, because the Seaboard had pulled out some of my rock.

Q. Then you took all of the supposed Seaboard ballast that you tested, did you?

A. Well, I didn't test it particular at Seaboard ballast; I tested it as rock going through that plant that might eventually reach me.

Q. But you took all of that you tested?

A. No, sir.

Q. You did not?

A. No, sir.

Q. You turned some of it down?

A. Well, let's see a minute. You mean that all I tested out there passed the specifications; is that what you mean?

Q. No; all of the supposedly Seaboard ballast that you tested, did you take it for the St. Lucy job, or did you turn some of it down?

A. No; because what they call the Seaboard ballast rock, when I come in there and test it, I don't know who was going to get it; I didn't know whether the Seaboard was going to get it or whether I was going to get it, and I would test it and maybe the Seaboard would get it and maybe I would get it. The rock at that time was interchangeable.

Q. Well, did you turn any of that down?

A. No, sir.

Q. You took all that you tested?

A. All that passed specifications.

Q. You took?

A. Yes, sir.

Q. Then you didn't test any rock that the Seaboard got, did you?

A. Oh, now, wait a minute. You are trying just to cross me up in there. You word that like this.

Mr. HIATT. Read the question.

96 The WITNESS. I either don't understand it or it seems like you are trying to cross me up. Now put your question to me again.

By Mr. HIATT:

Q. Did you take all the rock that you tested?

A. No, sir.

Q. Did you take all the rock that you thought was for the Seaboard that you tested?

A. No, sir.

Q. Did you turn some of it down?

A. No; I didn't turn it down, but I didn't take it, because they would not give it to me. I would have been glad to take the rock, but they would not give it to me, because they were shipping it to someone else.

Q. Why did you test it then?

A. Because if it would have come to me, I wanted to know whether it would pass specifications or not.

Q. Couldn't you then test it?

A. Yes, I could, but it takes about 24 hours to run a test—specific gravity test, see, and I kept testing the stuff as it come through the plant, so I would know where I was at.

Q. About how much did you test that the Seaboard eventually got that you actually know?

A. I could not say. I would not even try to say on that.

Q. Very much?

A. Well, I don't even know how much they were shipping to the Seaboard at all at that time, but I do know that the cars, when they were loading, and what they call ballast rock—now, my idea of ballast rock and concrete rock does not jibe with you fellows, I know that, and if it was under 2.46 specific gravity, it would not come to me at all; I didn't want it.

Q. But the Seaboard could use it?

A. The Seaboard could use it.

Q. And did any of that that you tested test fully 2.46?

A. Yes; we run some tests in there at one time where the rock that was coming out of the pit and going through the one big crusher, that run on the average of specific gravity about 2.42, and that is when I say we decided we would have to run this stuff through the impact crusher to increase the specific gravity on it.

Q. Then you do know that the Seaboard did take rock that you didn't accept.

A. No; I would not say whether they did or not. This might have gone to the State Highway Department.

Q. But you don't know that any of it went to Seaboard?

97 A. Yes; I do know that some of the rock I tested went to the Seaboard.

Q. About how much?

A. I would not try to judge, because I don't know how much they shipped to the Seaboard, but I believe in there that the Seaboard got three or four shipments of mine, and I got three or four shipments of the Seaboard's; it was interchangeable. The rock at that time was passing the specific gravity test of over 2.46.

Q. How do you know that the Seaboard didn't get rock that you would not accept, or was below the 2.46?

A. I don't know that they didn't get it.

Q. How do you know that didn't get, for ballast purposes, rock that was larger than two-inch?

A. Well, I don't know that.

Q. Well, you don't know then what the Seaboard got?

A. No; I would not know. Why should I know what the Seaboard got, because the Seaboard was—they were shipping to a dozen different companies.

Q. What is the difference between concrete rock and ballast rock?

A. Well, the best way for me to tell you that is to go out there and get a sample of concrete rock and a sample of ballast rock and spread it out on the floor and run a test on it.

Q. There is a difference then?

A. Yes; there is a difference. Now, I will tell you what I would call a ballast rock, and I am no judge of ballast rock; I am a judge of concrete rock, but I would call a ballast rock a crusher-run rock that would grade all the way from No. 4 right on up to 2, 2½, and 3 inches, whatever it happens to be.

Q. Did you turn down any rock up there because of gradations or specific gravity?

A. No, sir; I don't think so. I don't believe I ever turned any down.

Q. I believe you testified on direct examination that there was a lot of rock that you didn't pass?

A. No. I inspected some rock that would not pass. Now, that rock would pass on the gradation or it would not pass on the specific gravity, but I didn't turn it down; I just would not accept it. It was not for me; but all the rock that I inspected with the intention of shipping to Stuart I believe passed the inspection. Now, it seems to me—

Q. You didn't turn any down at all?

A. No; I didn't turn any down.

98 Q. Everything that you tested or inspected there, every bit of it was sold and delivered to the St. Lucy job, that the Seaboard didn't get away from you?

A. No; they were shipping to the Navy up at Indian River City, and they were shipping to Fort Lauderdale, and they were shipping everywhere in South Florida. They took barges away from there.

Q. I am talking about what you inspected.

Q. Well, I inspected rock every day, because I wanted to keep up with average—

Q. Well, answer the question, please. Weren't you up there inspecting the rock for the St. Lucy job?

A. Yes.

Q. And you were inspecting everybody else's rock?

A. I was inspecting rock that went through the plant. Now, wait a minute. Let me tell you something. The rock was taken out and dumped in storage piles. Now, this is a fine rock I am speaking about this time, No. 4, to one inch; it was dumped on

storage piles, and I didn't know whether I was going to get it; I didn't know who was going to get it. I kept inspecting those storage piles to see that the rock would pass inspection, and the same thing was happening on big rock. They had storage piles along the pit bank, and I would go out there and inspect these storage piles; then I would inspect the rock that they were loading in the cars, and at times when they were loading on barges for me and I knew that these barges were going to me, I would go down there and inspect the rock that was put on the barge. Now, I might have inspected that storage pile a dozen times, and some of that rock might have been taken off the storage pile and shipped to the Seaboard; others might have been shipped to Palm Beach or Indian River City or down here at Homestead. I didn't know where the rock was being shipped, but the rock that I was buying, that was being shipped to me, I was inspecting it and I was inspecting the rock as it come through the plant, so I would know where the rock was at.

Q. When was the Class B rock that had measured from two-inch to one-inch—when was it first shipped to the St. Lucy job?

A. I don't know whether we shipped any of that rock in January or not. They can tell you about that.

Q. Wasn't it just as important that gradations conform to the specifications as specific gravity?

A. My record here shows that on the 6th of August the first shipments of one-inch to 2-inch rock was made. Now, this does not include that January shipment, because I don't remember whether any of that big rock was shipped or not, but I believe it was. The fact is I know some of that rock was shipped. I don't know how much was shipped, but it seems to me—well, I know it was, some of it, shipped out there.

Q. You didn't answer my question awhile ago, so strike it and I will ask it again. Wasn't it just as important that gradations conform to specifications as specific gravity specifications?

A. Yes, sir; I think so. Some engineers say no, but I really think they do.

Q. Were you at the Seminole plant in March 1942?

A. I might have been, but I don't know. Wait a minute now. It seems to be that from somewhere between January and August that Mr. Hansen and I came down—Mr. Hansen was the engineer in charge of construction at St. Lucy—and me and Mr. Hansen came down to the rock plant one day, but I don't know what day that was.

Q. Did you test any rock that day?

A. Yes; I tested some rock that day, but I really don't know whether any was shipped or not.

Q. Was any shipped to Loftus in March?

A. I don't know.

Q. Did you test any in March for Loftus?

A. I don't know whether I did or not. I cannot remember.

Q. Did you test any rock at the Seminole plant that was shipped to Seaboard in March 1942?

A. Well, I don't know about that. I don't think that I was there in March. Now, I went down there one day with Mr. Hansen, but I don't know when it was.

Q. Then your records or your memory is not clear as to what you did at the Seminole plant, if anything, in March 1942?

A. No; I don't remember being there in March 1942. I might have been there in March 1942, but I don't remember it.

Mr. ANDERSON. You know you were there in January 1942?

The WITNESS. Yes; but I don't know whether it was March. I know that Mr. Hansen and I came down there one afternoon together, and I run some samples out there, but I don't remember whether there was any rock shipped or not, and I don't remember whether that was in March, April, May, or June. I know it was in there between the January trip and the August trip. We came in one time and got in there about noon.

By Mr. HIATT:

Q. Did you make your tests at the plant, or did you send them away to be tested?

A. I made them at the plant. I set up a little laboratory in one of the warehouses there.

100 Q. When did you do that?

A. To run those tests on. I run the gradation—

Q. When did you set up your laboratory?

A. Well, all it was was a set of scales, a couple sets of scales, and a set of screens and a few pans and a big can for—

Q. The question was, When did you do that?

A. I set them up there when I first went down there.

Q. Did you leave it there when you left in January?

A. No, sir; I carried it back with me.

Q. And on that trip when you came back with Mr. Hansen for part of a day you brought it all back with you and set it up again?

A. No; what I did then was brought a set of screens down and run a screen test, and we carried a sample back in the car and I run a specific gravity test on it after getting back to Stuart.

Q. On the tests that you made, did you make them by hand picking the samples, or did you take them in accordance with the approved practice as outlined by the Federal procedure—specifications?

A. I taken them by the approved practice. Now, here in running—

Q. Answer the question. Did you hand pick them according to Federal specifications?

A. According to specifications. Now, here's one thing; let me tell you about on the screen analysis. I would pick a sample at maybe a dozen places in a stock pile and I would shovel it into a bucket, maybe five pounds out of this place and five pounds out of the next place, and five pounds there, and get several samples off the stock pile. Then I would take this whole bucket and run a screen analysis on it. Now, here's some samples that I run on—

Q. Is that in answer to this question how you picked your samples? I mean what you are going to testify there?

A. This one sample was 26.625 of a pound; another one was 28.625—

Q. That is not an answer to the question. The question was, not the weight of the samples, but how did you pick them. You said you picked them according to Government specifications.

A. Yes, sir.

Q. That is all. Did you make a test on each barge or car shipped?

A. Yes, sir.

101 Q. Each one?

A. Yes, sir.

Q. Now, when you made these tests, did you make them from a stock pile or did you make them from the barge or car after it had been loaded from the crusher?

A. Well, I made them from the stock pile. When they were loading on barges and when they were loading in cars, if they were loading the cars from stock pile, I made them from the stock pile, and when they were loading them from the chute—

Q. Crusher.

A. No; the crusher I was catching the samples as they came out of the chute.

Q. Now, were those stock piles designated as belonging or being run for any particular party?

A. No, sir; they were designated as one to two-inch stone, I believe, or one to two and a half.

Q. But they were not called the Loftus stock pile or Seaboard stock pile?

A. I think they did at one time have a stock pile that was separate specifically for Loftus. Ain't that right?

Mr. BUNNELL. Yes; that is right.

By Mr. HATT:

Q. Who pointed out that stock pile to you?

A. Mr. Bunnell and a fellow by the name of Mr. Rankin. I believe he was the sales manager.

Q. Did the St. Lucy job get that stock pile?

A. They got part of it. A very small part of it, if I remember correctly.

Q. Where was that stock pile located?

A. That stock pile was located, I would say, on the north side of the pit, well west of the plant, up near the west end of the pit.

Q. But where was the stock pile for the A and B type, or class of rock for the Loftus job located?

A. That was one at that time that I was telling you about. The stock pile for A and B was on the north side of the pit well up near the west end of the pit. They had an A pile and a B pile at that same place.

Q. Did you know where the Seaboard stock pile was?

A. No; I would not.

Q. You never saw it?

A. I never saw it. At that time I was inspecting that stock pile I run several tests on that stock pile while it was in stock pile, and when they were loading it on the barges I would set a bucket under the dragline and let them drop a bucket full.

102 Q. That was the St. Lucy stock pile?

A. Yes; and then when the bucket was full I would jerk it up. I believe at that time that that rock was the one to two-inch stone, passed the specifications, but it seemed to me that it was so close on the one end that I argued about the gradation; it passed the specifications all right, but it was mighty close.

Q. Did you submit the test reports to your superiors on those cars or barges shipped with the purported ballast rock?

A. Yes; I don't know which one it was.

Q. Could you identify those reports?

A. No, sir; not the reports on those cars, because they passed specifications, and I shipped it as a car of rock.

Q. Who is your superior right now?

A. Well, darned if I know who is my superior. Colonel Viney up here at 1410, I believe—the Vocational School Building, on the 13th Floor, he is in charge of this district, and Colonel Viney was in charge of the Jacksonville district when I was working out of Stuart, and he was not my immediate superior. My immediate superior was Donald Hansen at Stuart.

Q. Can you identify by days or dates the cars of rock that were shipped to St. Lucy?

A. No, sir.

Q. Can you give the approximate number of barges or cars shipped, containing purported ballast to the St. Lucy job?

A. No; I can not do that, because I was not interested in whether it was supposed to be ballast or not. If it passed the specifications that were required by the Engineers, it ceased to be ballast

or any other kind of rock; it was concrete rock to me, because that is what they wanted, and that is what I shipped.

Q. And concrete rock is not the same as ballast rock?

A. I would not say so. You can use concrete rock for ballast.

Q. But not in Government specifications.

A. You can use anything for ballast rock. You can use coal or slack or any kind of soft rock. I think at one time they used sand rock all up and down the Seaboard.

Q. But can you use the average run of ballast rock for concrete rock and answer the Government specifications?

A. Well, I would not say you could, but you could use rock that was run by the Seminole Rock Company during the time I was there from August to October, the majority of that rock, the big majority could be used for concrete rock, and it was a good quality of concrete rock; it was not the best quality, but it was a good quality.

Q. Do you know what was being paid per cubic yard for the rock shipped to the St. Lucy project?

103 A. No, sir; I don't know what was being paid for it; I don't know what was being paid for any of the rock. Now, I would be staying around the office during spare times out there, and fellows would come in and buy rock, and I would hear them make them a price on it, but it seems to me like the rock was running, according to gradation, from a dollar and a quarter to two dollars; it all depended on how much they wanted. I don't remember; I would not like to say. They were getting a certain price for rock, because I don't actually know what they were getting for it.

Q. Well, if the rock that the Seaboard was buying in March was costing the Seaboard 60 cents a cubic yard, would you think that \$1.50 a cubic yard for the St. Lucy rock would have been high, which is over twice what the Seaboard was paying?

A. Well, I don't think that \$1.50 a yard for concrete rock is excessive charges.

Q. Wouldn't you think it was excessive charges that your Government was paying when some other private concern was paying less than half that?

A. Well, I don't know. I have seen some mighty poor grade of rock used for ballast. Now, they might have been selling that to them, but concrete rock is kind of expensive and it always has been expensive, and I don't know the price; I have never been interested in what the contractors were paying. Now, the Government, I have never inspected rock for the Government that was bought directly by the Government; always a contractor bought it and that price should have been agreed on; it was figured in the costs by the Government before the contract was ever let.

Q. You didn't test any rock that the Seaboard got in March then?

A. I don't think so.

Q. Then you didn't test all they got while you were there, did you?

A. No, sir; I would not say that I did.

Mr. HIATT. That is all.

Mr. ANDERSON. I just want to ask a couple questions.

Redirect examination by Mr. ANDERSON:

Q. Mr. Smith, you said that at one time there was a stock pile that was designated the Loftus rock; that is right?

A. That is right; yes, sir.

Q. And you said that Loftus got some of it?

A. That is right.

Q. Do you know who got the rest?

A. No, I don't.

104 Q. They have two crushers up there, haven't they?

A. Yes, sir.

Q. The impact crusher that you mentioned and a roller crusher.

A. That is right.

Q. Now, that roller crusher works something like a clothes wringer, doesn't it, except there is only one roller?

A. I don't know. Is that the jump crusher or roller crusher?

Mr. BUNNELL. Roller crusher.

The WITNESS. It works something like a clothes wringer.

By Mr. ANDERSON:

Q. And you can set it so as to permit different sizes of rock to go through?

A. That is right; it is adjustable.

Q. Take, for instance, if that pencil was the roller, it has got an iron steel side to it that can be moved in and pushed out; that is right, isn't it?

A. I think they call that the crusher plate, isn't it?

Mr. BUNNELL. Back plate.

By Mr. ANDERSON:

Q. Now, that back plate is set a specified distance from the roller, isn't it, so as to permit the rock to go through there?

A. To permit certain sizes.

Q. Now, that is the crusher the rock goes through after it goes through the dredge, isn't it?

A. That is right.

Q. Now, it was set, in order to get the rock for the Loftus job, for your two-inch maximum specification, wasn't it?

A. That is right; yes, sir.

Q. And so all the Loftus rock went through that roller crusher set for a two-inch maximum?

A. That is right.

Q. Now, the rock that the Seaboard got, did that go through the same crusher?

A. Yes, sir.

Q. It had to, didn't it?

A. Yes, sir.

Q. No other way for it to get out.

A. Unless you went and changed the crusher and I don't think that they would spend that time.

Q. It is a lot of trouble.

A. Now, how long would it take to change your plant?

Q. Well, did they change it?

A. Not as I know of; no, sir.

105 Q. The point I am trying to get at is that the rock which Loftus got and the rock which the Seaboard got went through the same roller crusher; is that right?

A. That is right.

Q. And it was set to conform to the Loftus specifications.

A. That is right; yes, sir.

Mr. ANDERSON. I think that is all.

Re-cross-examination by Mr. HIATT:

Q. That crusher you speak of, Mr. Smith, was that one set to run the Loftus rock then, wasn't it?

A. No, sir; not particularly to run the Loftus rock, but it was running all the large rock that went out there from—well, when it went through that crusher it was all sizes up to 2.5 inches, I guess. If you set the crusher to crush to two inches, it won't always crush to two inches; some of it will go through that crusher that won't pass the two-inch screen.

Q. Did you accept any for the Loftus job that would not pass the two-inch screen?

A. Well, some of it. Here's some of my samples here that show that a certain percentage would be retained on the two-inch screen.

Q. What percentage?

A. It would be well within the specifications.

Q. What percentage? Let's see those specifications.

A. That is 95 to 100 percent.

Q. Ninety-seven to 100 percent. Then you would say it was less than 3 percent?

A. Ninety-seven to 100 percent. On the 2-inch mesh I believe it was 95 to 100 percent. Now, you look back for that and see if that ain't right. I got it here 95 to 100 percent.

Q. Where you have it that, it would be less than 5 percent?

A. That is right. It was less than 5 percent.

Mr. HIATT. That is all.

Mr. ANDERSON. Will you waive signature to the deposition by the witness?

Mr. HIATT. Yes, sir.

The WITNESS. I believe you can safely say that at no time over 5 percent of it failed to pass the 2-inch screen.

(Thereupon the deposition was concluded.)

(Signature waived.)

Transcript

On May 6, 1944, Transcript of proceedings, testimony, stipulation and exhibits on Final Hearing at Orlando, Florida, on March 27-28, 1944, were filed in words and figures as follows, to wit:

Colloquy

The COURT. All right. This is the case of the OPA Administrator against Seminole Rock & Sand Company. Are both sides ready in this case?

Mr. LICHLITER. The Plaintiff is ready.

Mr. ANDERSON. We are ready.

Mr. LICHLITER. We will endeavor to make the evidence as concise as possible.

The COURT. You may proceed for the plaintiff.

Mr. ANDERSON. I don't know exactly where we are. This was the case of the hydrant wetting the dog. They started the suit, but we picked it up and carried the burden forward.

The COURT. Yes. The Court thought you started a little bit too early. However, it was understood that the evidence that you put in would be available at this hearing.

Mr. ANDERSON. That is correct. I stated in Miami that I had put in all of my evidence, but I have a couple letters that I would like to put in the record in addition to what was put in there in Miami.

Mr. LICHLITER. I would like to pass to your Honor a copy of the Act.

The COURT. I have a copy.

Mr. LICHLITER. And also a copy of the regulation involved. This is procedural regulation No. 1, and this is maximum price regulation 188, under which the ceiling price in question is established. That will appear from the copy which was in the Federal Register, and your Honor will take judicial notice of its recordation in the Federal Register.

Mr. ANDERSON. And of the contents of it?

Mr. LICHLITER. Yes. We may refer to it at any time as though it were a statute.

The COURT. That is something that does not please me very much.

Mr. ANDERSON. It is all right with me, your Honor. I just don't want the rules changed in the middle of the game.

The COURT. I judicially know all of the laws of all of the 48 states; but sometimes I have to have my recollection refreshed.

Mr. LICHLITER. We will leave with you a copy of Regulation No. 188, and I also understand that your Honor has a copy of the Act, and also a copy of procedural regulation No. 1.

The COURT. Yes. I think you may proceed.

Mr. LICHLITER. If your Honor please, we wish to introduce at the inception of the proceedings a stipulation between counsel for the respective parties relative to the admission of certain documentary proof, together with certain documents in the form of letters, purchase orders, and other exhibits of like character which are attached to this stipulation, the stipulation providing that it is admitted that the copies attached

thereto are true copies of the originals, the defendant reserving, however, any objection upon the question of materiality or relevancy, but not going to the competency thereof. I believe that is correct, is it, Mr. Anderson.

Mr. ANDERSON. That is correct.

The COURT. Admitted.

(Said stipulation marked "Plaintiff's Exhibit No. 1.")

Mr. LICHLITER. Pursuant to that stipulation, your Honor, we introduce in evidence Exhibit A of the Plaintiff, which has been agreed upon and is mentioned in the stipulation, which shows a summary of native rock ballast purchased by the Receivers of the Seaboard Airline Railway from Seminole Rock & Sand Company, Maimi, Florida, terms net, F. O. B. plant, Hialeah, Florida, covering ballast purchased during the period from May 1, 1942 to May 28, 1943, inclusive. That will be received in evidence, we request, as Exhibit A.

The COURT. Admitted without objection.

(Said document was marked "Plaintiff's Exhibit A." Photostatic copies thereof have been filed with this court; see stipulation in reprinting, R. 200, infra.)

Mr. LICHLITER. We propose to show by the testimony of witnesses certain additional matter in connection with the various shipments of ballast made by the defendant in this case to the Seaboard Receivers over the period of time from the month of March 1942 up to and through the month of May 1943. The highest price for ballast sold and delivered was March 1942—

Mr. ANDERSON. That is not correct, your Honor. That is going to become a point in this case. The statute says, "the term sale includes sales, dispositions, exchanges, leases, and other transfers and contracts and offers to do any of the foregoing. The terms sell, sellings, seller, buy, and buyer shall be construed accordingly." So that I hold—

The COURT. You mean that you contend. You don't hold.

Mr. ANDERSON. I maintain that the Seminole Rock & Sand Company had a continuing offer to sell during this period of time which was entirely to our benefit in establishing ceiling prices. In other words, the suspension of delivery had nothing to do with it.

The COURT. I was just trying to get the dates fixed in my mind. You may proceed.

Mr. LICHETER. Our position has been stated, and the regulation will be proper to show that the governing price is the highest price for an article that was sold and delivered during the month of March 1942.

108 Now, I wish to invite your Honor's attention to certain of the documentary proof in this case to show the course of shipments from the Seminole to the Seaboard Receivers over the period of time which is involved, and which appears from the documentary proofs and exhibits that are in evidence.

In this connection I will refer to a day letter, in the nature of a telegraphic communication, dated October 31, 1941, signed by J. L. Brown, who the evidence in this case shows to be the purchasing agent.

Mr. ANDERSON. What is the exhibit number?

Mr. LICHETER. The exhibit number is A-1. It is a day letter signed by J. L. Brown. The evidence in this case shows Mr. Brown to be the purchasing agent of the Seaboard Airline Railway. The day letter is addressed to the Seminole Rock & Sand Company. That day letter reads: "Enter order P-1012197 for 5,000 tons Miami native rock to be shipped when called for by Division Engineer Traphoner and loaded in SAL hopper bottom cars. Acknowledge." That is the initial order for the ballast, which our evidence shows was shipped during the month of March 1942 on an order given in October 1941.

I invite your Honor's attention also to Exhibit A-2, which is a letter dated November 1, 1941, signed by the Seminole Rock & Sand Company by J. L. Rankin, sales manager, addressed to Mr. J. L. Brown, purchasing agent, Seaboard Airline Railway, acknowledging receipt of the wire placing an order for 5,000 tons Miami native rock ballast.

Exhibit A-3 is a copy of the purchase order as submitted by the Seaboard to the Seminole Rock & Sand Company under date of November 10, 1941. It calls for 5,000 tons of Miami native rock at a

price of 60 cents per ton, F. O. B. cars, SAL Railway tracks. There is the initial purchase order for the shipments which were shipped in March 1942.

Now I invite your attention next to Exhibit A-4 of the plaintiff, which is a copy of a purchase order for an additional 28,500 tons, which was submitted under date of March 3, 1942. The date of this order is in March 1942, and it calls for the shipment of 28,500 tons of Class A Miami rock ballast, specification MW&S 304.

In that connection I read also, from the complaint in the present case, the specifications for stone ballast:

"1. Stone Ballast.—Stone for use in the manufacture of ballast shall break into angular fragments which range with fair uniformity between the maximum and minimum size specified; it shall test high in weight, toughness, wear, and soundness, but low in cementing qualities and will be free from dirt, dust, load, or rubbish.

"Tests may be made from time to time at the option of the purchaser and shall be made at a testing laboratory selected by the purchaser, but visual inspection and other tests shall be made at quarry prior to shipments as often as considered necessary. Tests for weight, toughness, wear and soundness shall be in accordance with A. R. E. A. Specifications for Stone Ballast.

"Class 'A' Stone Ballast will range between the size which will in any position pass through a two and one-half ($2\frac{1}{2}$) inch ring, and the size which will not pass through a three-quarter ($\frac{3}{4}$) inch ring."

The purchase order I have just referred to is dated March 3, 1942, and calls for 28,500 tons of Class A Miami rock ballast.

The next is Exhibit A-5, which is a telegram from J. L. Brown, purchasing agent of the Seaboard, addressed to the defendant, Seminole Rock & Sand Company, dated March 4, 1942, stating that the order for ballast was placed the day before and requesting advice when shipments might be expected.

The next exhibit is Exhibit A-6, which is a letter from the Seminole to Mr. Brown, which refers to the previous wire and the order that had been placed. The letter is signed by Mr. J. R. Rankin, sales manager, and reads:

"With reference to your wire of Mar. 4th, and confirmation dated March 3rd, Order No. P-221546-C-33 covering 28,500 tons of ballast.

"We are enclosing herewith a notice as exhibited in the Miami Daily News, March 3rd, which is self-explanatory and under instructions that the writer has, we cannot accept any further orders. However, the writer has taken this matter up with other members of our organization with a view of handling this particular order for you.

"Due to the increase in the cost of labor and repair parts, our production costs have advanced considerably and of course it is not profitable for us to produce material at the present level of prices and for this reason we would be unable to fill the above-mentioned order at 0.60¢ per ton. However, we have decided if you so desire that we will run the 28,500 tons required by you, as a special run at a 0.75¢ per ton price in order to take care of this order and at this figure will of course guarantee delivery of the required tonnage per day to the best of our ability.

"Please advise us by return mail if you so desire to have us handle this order at the increased price so that we may be able to make the necessary arrangements to produce same for you."

110 Attached to that letter is a copy of a notice which was published in a Miami paper of a date early in March—March 3—purporting to be signed by the Seminole Rock & Sand Company, which reads:

"NOTICE

"Seminole Rock and Sand Co. is Discontinuing the Production of Rock and Sand. All Orders Which We Have Accepted Will Be Finished Promptly

"1. Certain materials urgently requested for National Defense prevents our securing priority orders for repair parts, appliances, supplies, and materials essential to future operations.

"2. At present there appears to be an abundance of Rock and Sand available for prompt delivery in the Greater Miami Area.

"3. The property owned by the Seminole Rock and Sand Co. can be used for commercial or Defense purposes requiring inland lakes, waterways, railroads, highways, and land.

"4. Before removal of dredge, draglines, cranes, tractors, and other machines for excavating, transporting, and proceeding Rock and Sand, and changes, extensions, or additions desired in waterways, railways, and highways can be constructed economically and promptly. It is the most earnest desire of this Corp. for its personnel, production, plant, equipment, land, railway, and highways, to be of the greatest possible value to the U. S. government. Especially during the unlimited National Emergency proclaimed by the president.

"SEMINOLE ROCK AND SAND CO.,

"Red Rd. at 14th St. NW.,

"P. O. Box 3430, Phone 4-3515."

I now call your attention to Exhibit A-7, which is a wire of the 9th of March from Brown addressed to the Seminole, ac-

knowledging receipt of the letter I have just referred to, stating that it would be satisfactory to increase the price of the order, that is, for the 28,500 tons to 75 cents per ton.

There is a further letter, Exhibit A-8, dated March 9, 1942, from Brown to the Seminole, which reads: "Confirming my wire to you today, authorizing price of 75 cents per ton instead of 60 cents per ton, as shown on our order of the above number. Will you please advise promptly what we may expect as to delivery, considering of course our wire of March 4th, requesting that deliveries begin the latter part of April."

111 I propose to show by the other documentary evidence that no shipments at the increased price of 75 cents were made until during the month of April, and that during March, as shown by these wires and letters, there was an agreement on the additional price of 75 cents per ton.

That was followed by a letter, Exhibit A-9, dated March 10, 1942, signed by Seminole Rock & Sand Company, addressed to Mr. J. L. Brown, which refers to the order for the 28,500 tons of ballast. This letter reads:

"We are in receipt of your wire of March 9, 1942, in reply to our letter of March 6, 1942, giving us authority to increase the price on this ballast order from 0.60¢ to 0.75¢ per ton and we wish to advise that we accept this order on this basis and have changed the price carried on order to 0.75¢ per ton F. O. B. cars our plant.

"We will appreciate it if you will give use as much advance notice as possible when shipments are to be made on this order in order to enable us to have the necessary material on hand so as to avoid any delays in delivery."

Exhibit A-10 is a wire dated April 11, 1942, from Brown to the Seminole, whereby Brown of the Seaboard entered an additional order for 8,000 tons Miami native rock, requesting acknowledgement.

Exhibit A-11 is an additional order for 8,000 tons under date April 17, 1942, and calls for Miami native rock. This is a purchase order of the Seaboard addressed to the Seminole, there being stated on that order a price of 60 cents per ton. That is stated upon this purchase order dated April 17, 1942. We will show by the documentary evidence that no invoices moved under this particular order.

Exhibit A-12 is a wire dated March 6 from Seminole, addressed to Mr. Brown, requesting that they confirm the price of 75 cents per ton on such order.

Exhibit A-13 is a wire dated April 21, 1942, from Brown to the Seminole, confirming the price of 75 cents on the new order.

Exhibit A-14 is a communication in the form of a wire from Purchasing Agent Brown to the Seminole, dated April 28, 1942, which reads:

"Understand from our roadmaster Hancock you are in position furnish additional Miami rock ballast to our specification 304. Please advise at what price you could furnish one hundred thousand tons and at what rate shipments could be made."

Under date of April 30, 1942, Exhibit A-15, the Seminole Rock & Sand Company addressed a wire to Mr. Brown, purchasing agent of the Seaboard, stating:

112. "Retel we are in position to accept additional order 100,000 tons of ballast price will be 75 cents per ton can ship 25 to 30 cars per day please advise."

There the 100,000-ton order is accepted at the price of 75 cents a ton.

Exhibit A-16 is a day letter dated April 30, 1942, being a wire from Brown to the Seminole, reading:

"Retel. Enter order P-424043 for one hundred thousand tons ballast 75 cents per ton fob SAL for delivery as called for by Division Engineer Jacksonville. Confirming order follows."

Exhibit A-17 is a confirming order dated April 30, 1942. It is a copy of the purchase order submitted by the Seaboard to Seminole, calling for 100,000 tons Miami native rock (Ojus) to conform to Class A specification MW&S 304. For use ballast and dust rock North Florida Division. Price: 75 cents per ton.

I invite your Honor's attention particularly to Exhibit A-18, which is a letter from purchasing agent J. L. Brown of the Seaboard addressed to Seminole Rock & Sand Company under date of July 3, 1942, reading—

Mr. ANDERSON. I am going to put in an objection to that. I have no objection to you reading it, but I want to call the Court's attention to the fact that it is immaterial because it relates to the supposed general maximum price regulation. Now bear in mind, your Honor, that the specific price regulation that this defendant is charged with violating is No. 188, which was promulgated on August 1, 1942. Now your Honor stated a moment ago that you were charged with notice of these regulations that had been published in the Federal Register. The position of the OPA in this case is not only that the Seminole Rock & Sand Company was charged with notice of those that had been published in the Federal Register but of those that were going to be promulgated the following August.

Mr. LICHETER. In answer to that, prior to the effective date of 188 the commodity which we are concerned with in this case was covered by the general price regulations, and by the provi-

sions of the subsequent regulation No. 188 this particular commodity of crushed stone was taken out of the general maximum price regulations, and regulation No. 188 provided that the price to be charged would be the highest price charged in March 1942.

The COURT. I will bear in mind your objection, Mr. Anderson. Ruling reserved.

Mr. ANDERSON. Not only that, your Honor, but the general maximum price regulation was not promulgated until April 113 28, 1942, and back in March 1942 they are attempting to charge the Seminole Sand & Rock Company with notice of the fact that Mr. Leon Henderson on April 28 was going to promulgate something.

Mr. LICHLITER. In reply to that, I invite your Honor's attention to a letter of July 20, 1942, Exhibit A-21, signed by R. G. Lassiter, president of the Seminole Rock & Sand Company, which is addressed to Mr. Brown, purchasing agent of the Seaboard Air Line Railway, and which reads:

"Referring to our wire of July 11, 1942, and to your letter of July 3rd, we beg to advise that the highest price at which we sold ballast in March 1942 was seventy-five cents (75¢) per ton.

"We are now shipping you an order of one hundred thousand (100,000) tons at this price, which is about 50% complete.

"In accordance with our wire, we beg to repeat that it is impossible for us to accept orders for ballast other than that already undertaken. We have been advised that certain defense construction projects in this section are going to require our rock for immediate emergency construction. This will necessitate discontinuing shipments of ballast until these orders are filled.

"We fully appreciate the importance of the ballast to Seaboard Air Line Railway. It is now of great importance to supply defense projects with their requirements, which are unavailable elsewhere. We have made an intense study of these problems in the hope that we might continue ballast moving to Seaboard Air Line at the rate of twenty to twenty-five cars per day until all your requirements except the 115,000-ton order (which we declined), for ballast were fulfilled and at the same time supply the defense projects with their requirements.

"In order to do this, we would require in addition to twenty-five cars of ballast per day for Seaboard Air Line, thirty cars per day within ten days or two weeks from today and at least forty-five cars within less than thirty days from today. To accomplish this, we would be compelled to either rent or purchase a substantial amount of heavy equipment. This method of production greatly increases our unit cost. For that reason, we are unable to say at this time just what price would be necessary in order to enable us to accept

your order for the additional 115,000 tons which we declined by wire on July 11th.

"Please bear in mind that for many years at the request of your management, we have maintained stock piles of not less than 10,000 tons of ballast for emergencies, such as washouts,
114 hurricanes, etc. Today, we have less than 2,000 tons of ballast on our yards.

"Please be assured of our earnest desire to cooperate with you in every manner possible."

In that same connection, your Honor, I invite your attention to Exhibit A-19, which is a purchase order dated July 7, 1942, and ask your Honor to bear that date in mind, July 7, 1942. This is a purchase order from the Seaboard to the Seminole for 115,000 tons of ballast, and it calls for Miami native rock to conform to Class A specification MW&S 304. The price is 75 cents per net ton. Your Honor's attention I invite also, in that connection to Exhibit A-20, which is a wire dated July 11, 1942, from Seminole to Mr. Brown, reading:

"Re your order No. P-724015-C-33 for 115,000 tons ballast. Sorry we cannot see our way clear to accept this order unless some arrangement is made whereby all switching on our siding is done by your engines. Our present facilities inadequate and much too undependable to permit us to guarantee deliveries. Also present order with you will require approximately sixty days to complete and from information gathered locally we have no assurance that Seaboard tracks will be on their present location or just where they will be located sixty days hence. We regret our inability to serve you."

So there it appears that the order for 115,000 tons of ballast was actually declined.

Then there follows Exhibit A-22, to which I invite your attention, which is a day letter dated October 1, 1942, from purchasing agent Brown to the Seminole Rock & Sand Company, which reads:

"Referring conversation Sexton last week. We are in urgent need ballast and therefore authorize you enter order P-724015 for 115,000 tons Miami native rock at \$1.00 net ton fob Sal tracks. You are authorized increase price order P-424043 to 85¢ net ton on ballast remaining to be shipped. Acknowledge."

That was the remaining ballast to be shipped under the 28,500-ton order which was accepted at 75 cents a ton. By this wire of October 1st the price of the earlier order was increased to 85 cents, and the price of the new order for 115,000 tons was authorized to be increased to \$1.00 a ton.

Under date of October 3, 1942, Exhibit A-23, Mr. Brown wired the Seminole for acknowledgment of his wire that I have just read to you, authorizing that increase.

Exhibit A-24 is a wire from Seminole Rock & Sand Company to J. L. Brown, purchasing agent of the Seaboard Railway Company, which reads:

115 "We acknowledge receipt of your wire dated Oct. first placing order No. P-724015 for 115 thousand tons. We are making plans to resume shipment on order No. P-424043 about Oct. 15th at rate of not less than 50 cars per week with expectation of substantial increase in shipment shortly thereafter."

Exhibits A-27, A-28, A-29, and A-30 are copies of typical invoices from the Seminole addressed to Seaboard Air Line Railway, the first invoice, A-27, being dated March 16, 1942; covering a shipment of 51.85 tons of ballast at 60 cents a ton. This invoice is a duplicate of the 60-cent price which was in effect all during the month of March. Exhibit A-28 is a copy of an invoice under date September 29, 1942, 74.95 tons of ballast at 75 cents a ton. Exhibit A-29 is an invoice dated December 11, 1942, covering 658.5 tons of ballast at 85 cents per ton. Exhibit A-30 is dated May 17, 1943 and covers 251.50 tons of ballast at \$1.00 per ton.

So by these documents we have shown and invite your Honor's attention to the fact of the initial shipments in March at 60 cents per ton. The shipments at 75 cents per ton began in April 1942, the price increase to 75 cents becoming effective in March, with the shipments in April, and the price increase to 85 cents on one order, October 1, 1942, the 115,000-ton order, was accepted at the price of \$1.00 a ton.

I invite your Honor's attention further to certain documentary proofs concerning the order to the Seminole Rock & Sand Company from the Loftis Company, as to which testimony has been introduced covering the shipment of crushed stone in the month of January 1942, for use in the St. Lucie dam construction.

Our position, if the Court please, is that under the governing regulations, any offering price for ballast or for any crushed stone commodity that was not in fact sold and delivered in March 1942, would be wholly immaterial (when in fact ballast had been sold and delivered at 60 cents a ton), but subject to and without prejudice to our objection to the introduction of any testimony pertaining to this later order, we propose to show that the shipment of rock on the Loftis job for the St. Lucie Dam contract was totally different and not of the same class as the Seaboard ballast; that it was an entirely different material from the Seaboard ballast which conformed, as I have stated to your Honor, to the specifications of three-quarters to two and a half inches, and that this Class "B" crushed stone, which the Answer alleges they had ready for shipment during the month of March 1942 (which was

116 not in fact shipped), was an entirely different and distinct commodity. Without waiving our objection to that, we

propose to introduce certain testimony to show the total dissimilarity of the two substances. Now as pertinent to that and as showing the rigidity of the specifications for that class of crushed stone as distinguished from the standard Seaboard ballast, the specifications of which I have read to you, I now read certain documentary evidence that will be supplemented by proof to be introduced showing the dissimilarity of this other commodity (three-quarters to two and a half inches) to the specifications of one to two inches and will show by a system of percentage gradation that it is entirely different from the Seaboard ballast. I have before me a letter dated August 28, 1941, from the Seminole Rock & Sand Company, addressed to P. V. Loftis Company, Charlotte, North Carolina, signed Seminole Rock & Sand Company by J. R. Rankin, sales manager. This is Exhibit A-31, and it reads:

"Subject: St. Lucie Canal Dam, Indiantown, Fla.

"GENTLEMEN: We have a letter under date of Aug. 23rd from the office of the Southern Aggregate Corporation, Raleigh, N. C., to the effect that you had been awarded the contract for the St. Lucie Canal Dam and that your Mr. Chas. A. Green would be in Indiantown Tuesday the 26th. The writer went to Indiantown Tuesday and endeavored to locate Mr. Green but could not find that he had been there. The writer also returned to Indiantown Wednesday in order to contact Mr. Green but was unsuccessful in locating him, therefore we are writing you direct relative to the aggregate required for this project.

"Although we have not seen the specification covering the aggregate on this specific job, we understand it is under the supervision of the U. S. Engineers' Office, Jacksonville, and is probably under Federal Specification SS-A-281, therefore, if the material required is under this specification or a similar Federal Specification, we wish to quote you the following prices:

"Crushed Concrete Rock, 0.90 per ton; Screenings, Sand, 0.70 per ton.

"The above prices are F. O. B. our plant, Miami, Fla., and we are advised by the Seaboard Railway that the freight rate to Indiantown is \$1.00 per ton.

"If this material must move via barge, if you will so advise we will endeavor to line up a towing concern to handle it. Although the barge situation is very unsatisfactory at the present time, due to increased water movement on defense work, we may be able to work out some deal with a local towing concern.

117 "The writer would very much like to contact Mr. Green and if he is in this territory, we would appreciate a wire from you advising where we can contact him.

"Trusting the above prices will be interesting to you and trusting to hear from you by early mail, we are"

In that connection I invite your Honor's attention to the particular statement in the answer of the defendant which refers to this St. Lucie contract, this Loftis contract. The testimony previously introduced shows that there was a shipment not of the Class "B" aggregate, which it is claimed was of the same character and identical with the Seaboard ballast, but of Class "A" rock, which was used in the dam construction. The Answer reads:

"In January 1942, V. P. Loftis Company had a contract with the United States for the construction of the St. Lucie Dam at Stuart, Florida. A representative of this firm telephoned the defendant's plant and requested the quotation of prices for approximately 7,000 cubic yards of crushed stone meeting the following specifications:

"CLASS A—Passing:

Screen 1"	97-100%
Screen 1½"	40-70%
Screen ¾"	0-6%

"CLASS B—Passing:

Screen 2"	97-100%
Screen 1½"	40-70%
Screen 1"	0-6%

Attached to the Answer is a copy of the purchase order from the Loftis Company to Seminole dated February 11, 1942, which calls for approximately 7,000 cubic yards of crushed stone for A and B type concrete at \$2.50 per cubic yard on barge job site.

A further exhibit to the Answer is an invoice from Seminole Rock & Sand Company to V. P. Loftis Company under date January 15, 1942 invoicing four barge shipments of a total of 390 cubic yards special rock (A) THTNO 8560, unit price \$2.50, making a total of 390 tons of this Class "A" rock, which is not the Class "B" rock claimed to be identical with the Seaboard ballast.

The Answer further alleges in that connection that this shipment was made pursuant to telephone conversation, which accounts for the fact that the invoice is dated prior to the purchase order. We submit that the evidence shows without contradiction that none of the Class "B" rock, which was claimed to be substantially the same thing as Seaboard ballast, was shipped prior to March 1942.

118 The evidence further shows, we submit, that none of the Class "B" rock, meeting the one- to two-inch specification, was actually sold and shipped during March 1942, when the price

of 60 cents per ton was being charged on Seaboard ballast, and that there was in fact no shipment of Class "B" rock, meeting the one to two inches, made until considerably subsequent to March 1, 1942. The evidence already introduced shows that the Loftis Company had advised the Seminole Company that for certain reasons at the plant shipments should be discontinued for a time, and that shipments were in fact not resumed until late in the summer.

Bearing that in mind, with a view of pointing out the rigidity of these specifications for this rock to be used in the dam construction, and the gradation of that rock in definitely defined grades—97% of it had to go through the two-inch screen. Your Honor will recall that the Seaboard ballast is larger and goes up to two and a half inches, three-quarters to two and a half inches being the size of the Seaboard ballast.

I call your attention to this letter, a letter dated June 17, 1942, from V. P. Loftis Company by J. C. Kellog, reading as follows:

"Acknowledging your letter of June 15th, your interpretation of the specifications is correct for the class A concrete and is as stated in your letter with a gradation from $\frac{1}{4}$ " to 1".

PASSING.

"1" -----	97-100%
$\frac{1}{2}$ " -----	40-70%
$\frac{1}{4}$ " -----	0-6%

"The maximum size for class "B" concrete to be 2" with the following gradations specification.

"Screen 2" -----	97-100%
Screen $1\frac{1}{2}$ " -----	40-70%
Screen 1" -----	0-6%

"Please note that you are to make 2 separate stock piles: one for the gradation of $\frac{1}{4}$ " to 1", and one for the gradation of 1" to 2". The combining of the class "A" stone with the class "B" stone to make class "B" concrete will be made at the job.

"We have yet to pour approximately 6,000 yards of class "B" concrete, the stone to be shipped as follows: 2,500 yards on the job by July 15th and 2,500 yards a month until complete. We have yet to pour approximately 600 yards of class "A" concrete. This entire quantity can be shipped about August 1st, 1942.

119 "Trusting the above is the desired information, if not, please advise us at once."

We submit that to show the importance of the adherence to these well-defined specifications for this rock to be used in the dam construction as contradistinguished from the Seaboard specifications on the larger rock.

I now invite your attention briefly to Exhibit A-38, which is admitted to be a tabulation of the order commitments of the

Seminole Rock & Sand Company as of March 11, 1942, and an inventory of their products as of that date. It shows a general division of their products under two general heads. One is under the head of Specification Rock, and one is under the general heading of Regular Rock. It also contains headings for Concrete Rock and Pea Rock. Those are under the headings Regular Rock. Under the "Regular Rock" is listed ballast, 31,500 tons, which was committed by order at that time, March 11, 1942. Under the heading "Specification Rock" we have 6,500 pounds committed for order to the St. Lucie dam at that particular date, March 11, 1942. Then under the inventory of the various classes of commodities there is inventoried first the quantity of 18,344 cubic yards of ballast, and then there is an inventory of other rock which is not material in this case. The Specification Rock is inventoried entirely separate and distinct from ballast. The St. Lucie Specification Rock is inventoried at this time at 900 cubic yards. A later inventory under date of March 24, 1942, shows the same general division of the two classes of rock, Specification Rock and Regular Rock. Under the Specification Rock there is listed at that time the same order commitment of 6,500 tons for the St. Lucie Dam, and the same commitment for regular rock or ballast of 31,500 tons. The inventory shows that there had been shipped between March 11th and March 24th some ballast, showing a decrease in the ballast pile from 18,000 cubic yards to 13,000 cubic yards, but the same inventory shows that the St. Lucie specification rock remained stationary at the figure of 900 tons. This is being submitted to show that the two classes of crushed stone products were treated by the company as separate and distinct.

Mr. ANDERSON. That is your interpretation of it.

Mr. LICHLITER. In other words, I am making that explanatory reference to the Court, and we propose to introduce such evidence.

The COURT. You may proceed.

120 Thereupon CYRIL D. ARNOLD, a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. LICHLITER:

Q. Please state your name.

A. Cyril D. Arnold.

Q. What is your business connection, Mr. Arnold?

A. I am an investigator for the Office of Price Administration stationed at Miami, Florida.

Q. How long have you been in that capacity?

A. Since June 1942.

Q. Are you still an investigator of the Office of Price Administration?

A. Yes.

Q. Mr. Arnold, during the year 1948 did you have an occasion to make an investigation of the records of the Seminole Rock & Sand Company relating to the shipment of rock products?

A. I did.

Q. When did you commence that investigation?

A. Sometime in the early part of April 1948.

Q. Did you go to the plant of the Seminole Rock & Sand Company near Miami?

A. I did.

Q. With whom did you confer there; just who did you meet there?

A. I met Mr. Benson, Mr. Rankin, and Mr. Clark.

Q. Did you subsequently meet Mr. Brushwood there?

A. I met Mr. Brushwood down at the Miami office.

Q. At the Miami office?

A. Yes.

Q. At the plant did you request to examine certain records of the company pertaining to shipments of crushed stone and other products produced by them?

A. Yes.

Mr. ANDERSON. I want to raise the point that a witness sent out by the OPA to investigate a citizen may not testify as to any matters that he found in that investigation insofar as the action for a penalty is concerned, because it is a violation of the citizen's constitutional right to bear evidence against himself.

The COURT. The Supreme Court ruled that a corporation has no constitutional rights. I think it was in the antitrust case that they held that a corporation could be compelled to produce its documents.

121 Mr. ANDERSON. This case is in two parts; one is the appeal to the equity side for injunction, and I don't think that the testimony would be sacred in that case, but insofar as it concerns the penalty action the Supreme Court has held that it is.

The COURT. The objection is overruled.

Q. When you went there did you make yourself known to the officers of the company?

A. Yes.

Q. Did you introduce yourself?

A. Yes.

Q. Did you show them your credentials?

A. Yes.

Q. Did they, in response to your request for an examination of the records, furnish you certain records to examine?

A. Yes.

Q. In connection with those records which you examined, did they make available for your examination invoices relating to shipments of rock ballast to the Seaboard Air Line Railway Receivers during the month of March 1942?

A. Yes.

Q. Did you examine those invoices?

A. Yes, sir.

Q. Then did you subsequently make an examination of the record of the Receivers of the Seaboard?

A. Yes, sir.

Q. Where did you make that investigation and when?

A. About the middle of July 1942, I went up to Norfolk, Virginia, and in the auditing department I was given access to records pertaining to shipments of ballast by the Seminole Rock & Sand Company to the Seaboard.

Q. Who did you contact there in the auditors' office?

A. I first contacted Mr. Powell, who in turn received permission from their legal staff to allow me to do this. Mr. Powell in turn turned me over to Mr. Jarrell, who was supervisor of vouchers covering the payment of invoices as rendered by the Seminole Rock & Sand Company.

Q. Did you proceed to examine the records that they furnished you?

A. Yes.

Q. Did they furnish them willingly?

A. Yes, sir.

Q. With what representative of the auditing department did you work?

A. Mr. Jarrell.

Q. What was the work that you and he did together; did you prepare a statement?

122 A. Yes. With his assistance I went through all of the invoices that were rendered.

Q. I hand you plaintiff's Exhibit "A" in this case and ask you to state whether or not those sheets purport to correctly show the shipments and the invoice numbers over the period of time covered by it? In other words, just how was that prepared; was it prepared on the basis of original records?

A. It was. Mr. Jarrell dug out all of these back invoices, right up through the last invoice that he had a record of, and then with his assistance this chart or compilation was prepared.

Q. Did your examination of the Seaboard records embrace all of the invoices received by the auditors' office from the Seminole Rock & Sand Company covering shipments of rock ballast during the month of March 1942?

A. Yes.

Q. From your examination of these invoices what was shown to be the highest price charged by the Seminole Rock & Sand Company for ballast sold and delivered to the Receivers of the Seaboard during the month of March 1942?

MR. ANDERSON. The invoices are the best evidence, and I object to any testimony by this witness on that score.

The COURT. Is there any dispute about it?

MR. ANDERSON. No, sir. We have admitted that this compilation is true and correct and that it may be introduced in evidence. Not only that, your Honor, but the pleadings admit it. There is no dispute about it. We are just wasting time here.

MR. LICHLITER. I will withdraw the question in that connection, if you admit it, Mr. Anderson.

MR. ANDERSON. I will admit the exhibit in evidence.

Q. Will you refer to that statement before you, Mr. Arnold, and state between what periods of time, between invoices and between date of shipments the price of 60 cents per ton was mentioned.

MR. ANDERSON. I object to that, although I do not want to be captious.

The COURT. Doesn't the statement show that?

MR. ANDERSON. Yes.

MR. LICHLITER. I merely had the idea of calling your Honor's attention to it.

The COURT. I understand that it is already in evidence.

MR. ANDERSON. I have admitted that that statement is correct.

The COURT. There is no dispute about that. Go on to something else. You may call my attention to it, since it is in evidence.

123 Q. Now based upon the exhibit which you have just identified, Mr. Arnold, have you made a computation of the shipments of rock ballast by the defendant to the Seaboard Receivers over the period of time between October 16, 1942, and December 16, 1942; a computation in tonnage and the amount charged?

A. Yes, sir.

Q. Does the exhibit show that?

A. It doesn't show the totals.

MR. LICHLITER. This is just intended to be informative to the Court.

MR. ANDERSON. If it is for that purpose then I have no objection.

Q. Please state what computation you made in that connection.

A. From that tabulation I ascertained that the Seminole Rock & Sand Company sold and delivered between October 16, 1942, and December 16, 1942, inclusive, 25,239.25 tons of ballast to the Re-

ceivers of the Seaboard Air-Line Railway at the price of 85 cents per ton.

Q. Did you compute that between December 11, 1942, and May 28, 1943?

A. Yes.

Q. What did you compute in that connection?

A. Between these dates the Seminole sold the Receivers of the Seaboard 92,316.15 tons of ballast and charged them \$1.00 per ton.

Q. What was the aggregate amount of those two charges on the basis of 85 cents per ton and on the basis of \$1.00 per ton?

A. 43,236.27.

Q. Does that represent the amount in excess of the price of 60 cents per ton which that same quantity of ballast would have amounted to?

A. Yes.

Q. Does this statement, that you have identified, reflect and list all of the invoices of the Seminole to the Seaboard Receivers that were exhibited to you for examination as covering shipments during the month of March 1942?

A. Yes.

Q. Does it reflect, according to the invoices exhibited to you, all of the shipments that the Seminole Rock & Sand Company made to the Seaboard Receivers over the period covered by the statement, from March 3, 1942, to May 27, 1943, as you found it from the Seaboard records?

A. Yes.

124 Mr. LICHLITER, You may inquire.

Mr. ANDERSON. No questions.

Thereupon JAMES L. BOOTH, a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. LICHLITER:

Q. Please state your name.

A. James L. Booth.

Q. Where do you live, Mr. Booth?

A. 3141 Northwest Second Street, Miami.

Q. What is your present position?

A. Machinist at the Davis Machine Works.

Q. What has been the particular line of mechanical work that you have followed in your life; in other words, has it had to do with the production of rock products?

A. Yes, sir; rock products and street and road building.

Q. Would you consider yourself experienced in the production of products involving crushed stone?

A. Yes.

Q. And other commodities or like character?

A. Yes, sir.

Q. Were you formerly connected with the defendant in this case; the Seminole Rock & Sand Company?

A. Yes, sir.

Q. Over what period of time did your connection with that company extend?

A. The last connection with them was from August 1, 1937, to about March 25, 1942.

Q. Over that period of time what was your position?

A. Superintendent.

Q. What was your general work with respect to the production of the products of that company at that time?

A. Supervision of the manufacture of all products of the Seminole Rock & Sand Company.

Q. Did that include the production of the commodity furnished over that period of time as Seaboard ballast?

A. Yes, sir.

Q. Did it include also the commodity that was held ready for shipment in January 1942, some of which was shipped with respect to the St. Lucie Dam project?

A. Yes; it included all products made by Seminole.

Q. Were you familiar over that period of time with the specifications covering Seaboard ballast?

A. Yes, sir.

125 Q. You were familiar with that product that was shipped by the Seminole Rock & Sand Company to the Seaboard Receivers in the month of March 1942?

A. Up to the 25th of March.

Q. You were at the company until the 25th of March?

A. Yes.

Q. What is the purpose for which that ballast is used from the standpoint of the size of the ballast; for what construction purpose is that used?

A. For stabilization of tracks and ties.

Q. In connection with the construction and maintenance of railroad tracks?

A. Yes, sir.

Q. Will you state to the Court the specifications for ballast with regard to size?

A. Uniform gradation from two and a half down to three-quarters.

Q. It didn't require any definite percentage of gradation between the different sizes?

A. The only thing was that it had to be uniformly graded from two and a half maximum to three-quarters minimum.

Q. It didn't require any proportionate fixed percentage of gradation?

A. No, sir.

Q. Familiar as you were with the specifications for the Seaboard ballast, I invite your attention now to the specifications of the Class "B" rock as referred to in the Answer of the defendant in this case, and ask you to look at those specifications and state whether or not the Seaboard ballast so furnished during the month of March 1942 and prior thereto would be interchangeable with the Class "B" rock of the St. Lucie job?

A. It would not.

Q. You were at the Seminole plant in January and February of 1942, were you not?

A. Yes.

Q. Do you recall at that time setting up two piles of crushed stone for the fulfillment of the Loftis order on the St. Lucie Dam project?

A. Yes, sir.

Q. How many piles were made in that connection?

A. Two piles.

Q. What was the purpose in making two piles?

A. To keep them separate from the other products that were made.

Q. Did you make a pile of Class "A" rock for the Loftis job?

A. Yes, sir.

126 Q. And a pile for the Class "B" rock?

A. Yes, sir.

Q. Were those piles prepared in accordance with the specifications as stated for this St. Lucie job?

A. Yes, sir.

Q. Was the rock in these two separate piles separate and distinct from Seaboard ballast?

A. Yes, sir.

Q. Was it an entirely different commodity?

A. Yes.

Q. At the same time that these two piles were in existence in January and February 1942, was a Seaboard ballast pile maintained at the establishment at the same time?

A. Yes.

Q. Was any rock out of the Seaboard ballast pile shipped to fulfill the order in March to the Loftis Company job?

A. No, sir.

Q. Did that condition obtain up to the time that you left in March 1942?

A. Yes.

Q. Up to the time in March you left there, had any of this Class "A" or Class "B" rock been shipped to the St. Lucie project during the month of March 1942?

A. I don't know whether it was during the month of March, but some of it was shipped to the St. Lucie project before March 25th; some of the smaller rock.

Q. But none of the Class "B" rock had been shipped?

A. I don't recall any having been shipped.

Q. And during the month of March 1942, was any of the Class "B" rock shipped?

A. That is the question I just answered. I don't recall any of the "B" rock having been shipped.

Q. Not during the month of March up to the time you left?

A. That is right.

Mr. LICHLITER. You may inquire.

Cross-examination by Mr. ANDERSON:

Q. Now, Mr. Booth, what did you say your job was at the Seminole plant?

A. Superintendent.

Q. You had charge of production?

A. Yes, sir.

Q. Was Mr. Rankin there at that time?

A. Yes, sir.

Q. What was his job?

A. Sales Manager.

127 Q. Was Mr. Clark there?

A. Yes.

Q. What was his job?

A. His job was in connection with duties that he was assigned to in the office.

Q. He was an office man?

A. Yes.

Q. He had nothing to do with the operation of the plant?

A. Not at that time.

Q. And neither did Mr. Rankin?

A. No, sir.

Q. You left on the 25th of March 1942?

A. Yes, sir.

Q. You have not been back to the Seminole plant since that time?

A. Yes, I have been back there.

Q. I mean, you have not been in there employ since?

A. No, sir.

Q. After that time you don't know what rock they sold and shipped to the Loftis Company, do you?

A. No.

Q. You don't know what rock they sold and shipped to the Seaboard?

A. I don't know anything about their sales or shipments since March 25, 1942.

Q. You do know that in January 1942 they had a stock pile for the Loftis people consisting of two classes of rock?

A. Yes.

Q. Class "A" and Class "B"?

A. Yes.

Q. Class "A" was the smaller size?

A. Yes.

Q. And Class "B" was the larger size?

A. Yes.

Q. They didn't ship any of that Class "B" rock to Loftis while you were there?

A. Not that I remember.

Q. But you do remember that they shipped some of the Class "A" of the smaller size?

A. Yes.

Q. Do you know what they did with that rock pile; with the Class "B" stock pile?

A. It was there when I left there.

Q. You don't know what happened to it after you left?

A. No.

128 Q. Now, Mr. Booth, this paper that I am handing you is a part of this court file and it is entitled "Second Amended Complaint." Over here on page 3 is a reference to the Class "A" stone ballast according to specifications for the Seaboard Railway. Were you familiar with those specifications at that time?

A. Yes.

Q. In the third paragraph of these specifications I call your attention to this language: "A Stone Ballast will range between pea size which will in any position pass through a two and one-half inch ring, and the size which will not pass through a three-quarter inch ring." You were familiar with that specification at that time?

A. Yes; I was familiar further, with the specifications of Seaboard ballast.

Q. These are the only ones involved in this case so far as I am concerned. If those others were of any importance I suppose the OPA would have brought them into the case.

A. All right.

Q. I call your attention now to a document also in this court file entitled "Answer," and over on page 9 thereof it says: To the Loftis Rock Specifications for Class "B," as follows: "Screen 2", passing 97-100%; screen 1 1/2", passing 40-70%; screen 1" passing

0-6%." Were you familiar with these Loftis specifications at that time?

A. Yes.

Q. Now I ask you if it is not a fact that the Seaboard specifications that I read to you from the Second Amended Complaint, which provides that the Class "A" rock would pass through a 2½-inch ring to ¾-inch ring, would pass the Loftis specifications?

A. As it is written in there, it would.

Mr. ANDERSON. I think that is all.

Redirect examination by Mr. LICHLITER:

Q. I believe you testified on your direct examination that the Seaboard ballast according to the specifications was not interchangeable with this product known as Class "B" concrete; is that correct?

A. I don't remember having answered the question that way, sir.

Q. Well, would the Seaboard ballast specifications fulfill the Class "B" specifications of one to two inches that was used on the Loftis job?

Mr. ANDERSON. That is not the point. I object to that. It is a question of what price the company offered for delivery the rock prior to March 1942, that would fill the Seaboard specifications. The contrary does not have to be true.

The COURT. The objection is overruled.

A. Not completely.

Q. What was the difference with respect to gradation between the Class "B" Loftis specifications and the Seaboard ballast?

A. The Seaboard ballast was to be uniformly graded between two and a half inches and three-quarters of an inch.

Q. Was there any requirement of proportionate gradation?

A. No.

Q. What was the purpose of that proportionate gradation in the Loftis specifications?

Mr. ANDERSON. I object to that. This witness did not prepare those specifications.

The COURT. I don't think that he has qualified as an expert on these specifications or as to gradation.

Q. What is gradation in these specifications?

A. Size.

Q. Why is gradation necessary?

A. Gradation is necessary to fill the voids of the large rock with smaller rock.

Q. Was it necessary to have the same proportion of gradation in the Seaboard ballast as the gradation appears in the Loftis ballast?

A. No, sir.

Q. In other words, the Seaboard ballast had to fulfill only a uniformity between three-quarters of an inch to two and a half inches; is that correct?

A. Yes, sir.

Mr. LICHLITER. That is all.

Re-cross-examination by Mr. ANDERSON:

Q. All of your testimony, including that last, relates to a time prior to March 25, 1942?

A. Yes.

Q. Based upon your experience in the rock business does railroad ballast come within any of these terms: crushed stone, construction, metallurgic, chemical?

A. It comes under the head of crushed stone.

Q. Does it come under the head of any of the other classes that I read you, construction; metallurgic, and chemical?

A. It can be classed as a construction stone.

Q. Could it come under any of the other heads?

A. No; not under metallurgic or chemical.

Q. But it might be construction stone?

A. Yes. Any stone may be construction stone.

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By Mr. LICHLITER:

Q. You are speaking of Seaboard ballast, not Class "B" ballast? Before the *the* Seaboard ballast could be used to fulfill the Class "B" specifications, would it have to be subjected to certain processes?

A. Yes.

Q. Under the general specifications of three-quarters of an inch to two and a half inches, I understood you to testify that it would not fulfill the Class "B" Loftis specifications?

A. No.

Q. What would be necessary to do to it?

A. It would be necessary to recrush it and rewash it.

Q. Why?

A. To make it conform to the size of the specifications.

Q. In its natural state of three-quarters of an inch to two and a half inches, it would not conform without that additional treatment?

A. No; it would not.

Re-cross-examination by Mr. ANDERSON:

Q. Do you remember an inspector out there by the name of Earl Smith who inspected that stock pile?

A. Yes, sir.

Q. He was an inspector of the United States Engineer's office?

A. Yes.

Mr. ANDERSON. That is all.

Mr. LICHLITER. I have no further questions of this witness.

Thereupon J. R. RANKIN, a witness for the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. LICHLITER:

Q. Please state your name.

A. J. R. Rankin.

Q. Where do you reside?

A. Miami, Florida.

Q. Were you at any time in the employ of the Seminole Rock and Sand Company?

A. Yes, sir.

Q. When was your connection with that company?

A. From May 1937 until May 1943, with the exception of April, May, and June of 1942.

Q. What was your position with the company in the month of March 1942?

A. I was sales manager.

131 Q. How long did you occupy that position?

A. Two or three years.

Q. In that capacity with the Seminole what did you have to do with shipments of ballast to the Seaboard Receivers in March 1942 and prior thereto?

A. I didn't handle any sales of ballast.

Q. You didn't handle any sales of ballast?

A. No, sir.

Q. You were familiar with the ballast specifications?

A. I was.

Q. Your duties were in connection with getting business for the company?

A. That is right.

Q. I invite your attention to a letter which has been introduced in evidence here as Plaintiff's Exhibit A-9, dated the 10th of March 1942, and ask you to state if you are the J. R. Rankin who signed that letter?

A. Yes.

Q. In your capacity as sales manager of the Seminole Rock and Sand Company?

A. Yes.

Q. You signed it as such?

A. Yes, sir.

Q. Prior to March 1942 or in the latter part of 1941 did you learn of the projected work on the St. Lucie dam project?

A. Yes, sir.

Q. Were you at that time interested in securing a contract for the furnishing of the crushed stone in that connection?

A. Yes, sir.

Q. I invite your attention to a letter of August 28, 1941, addressed to the P. V. Loftis Company, and ask you to state whether or not that letter was written by you as sales manager of the Seminole Rock and Sand Company?

A. Yes, sir.

Q. Being Exhibit A-31.

A. Yes.

Q. Did you know the specifications at that time of the Loftis contract?

A. No, sir.

Q. Did you subsequently learn the specifications between August 28th and the next letter of September 22nd?

A. Yes, sir.

Q. I invite your attention to Plaintiff's Exhibit A-32, a letter of September 22, 1941, to the Loftis Company, and ask you if you signed that letter?

A. I did.

132 Q. I invite your attention particularly to this part of that letter: "Due to the fact that the specifications covering the concrete aggregate is so rigid and from what information we have been able to gather on the present project, together with information we have on previous jobs of a like nature-constructed, in the St. Lucie Canal, we do not feel that it would be of any use to submit samples of our material to Jacksonville for testing. It is our understanding that inspection on previous work at St. Lucie has been very rigid due to the nature of the construction and with this in view we would not want to agree to furnish you material under the present specifications." You wrote that in that letter, did you?

A. Yes, sir.

Q. Now at the time of that letter of September 22, 1941, did you have Seaboard ballast available at the company that you did not furnish to the Seaboard under your contracts with them?

A. Yes, sir.

Q. At the time of your writing that letter in September 1941, would the Seaboard ballast have fulfilled the specifications of the St. Lucie contract as you understood them at that time?

A. No.

Mr. ANDERSON. I object to the question and move to strike the answer on the ground that it is immaterial and irrelevant.

The COURT. Overruled.

Q. It would not have fulfilled it?

A. No.

Q. I invite your attention to page 9 of the Answer of the defendant in this case and ask you to look at the specifications of the

Class "A" and Class "B" stone which are there stated as the specifications on the Loftis job, Class "A" referring to one-quarter inch to one inch, and Class "B" referring to one inch to two inches, and ask you to state whether or not the Seaboard ballast would have fulfilled the Class "B" specifications?

A. No, sir; for the reason that the specifications on Seaboard ballast was two and a half inches to three-quarters of an inch, and the St. Lucie job specifications were two inches to one inch.

Q. What did you observe in class "B" as to gradation on the Loftis job?

A. There's a certain percentage requirement of three sizes, two inches, one and a half inches, and one inch.

Q. Were there any such requirements in the Seaboard ballast?

133 A. No. The Seaboard ballast was to be uniformly graded from two and a half inches down to three-quarters of an inch.

Mr. LICHLITER. You may inquire.

Cross-examination by Mr. ANDERSON:

Q. Mr. Rankin, you have identified this Exhibit A-32 as being a letter that was written by you on September 22, 1941?

A. Yes.

Q. I ask you if that letter was in answer to this letter that I hand you?

A. What is the date of that letter?

Q. September 22nd?

A. No; I don't think so.

Q. You didn't have this letter when you wrote the letter of September 22, 1941?

A. No; I didn't.

Q. Have you ever seen it before?

A. Yes; I have seen it but I didn't have it at that time.

Q. It is addressed to the attention of J. R. Rankin?

A. Yes, sir.

Q. And that is you?

A. Yes, sir.

Q. You did receive it?

A. I received it finally, but I didn't have it when I wrote that other letter.

Q. You didn't have it when you wrote the letter of September 22, 1941?

A. No.

Q. Do you know where it was in the meantime?

A. No.

Q. When you first saw it did it have this specification sheet or sheets attached to it?

A. Yes.

Mr. ANDERSON. I ask to have this marked for identification.

(Letter of September 10, 1941, together with attachment, marked "Defendant's Exhibit 1" for Ident.)

Q. You testified that the Seaboard ballast according to the specifications would not fill the order for the Loftis job according to its specifications?

A. Yes, sir.

Q. Now I want to ask you if the Class "B" rock under the Loftis order and according to its specifications would fill the Seaboard ballast specifications?

A. No; not according to the Seaboard specifications.

Q. You heard Mr. Booth's testimony here to the effect that it would, did you not?

134 A. Not according to the specifications. The specifications are entirely different.

Q. Why not?

A. Because the Seaboard rock has to ring two and a half inches down to three-quarters of an inch, and the St. Lucie rock has to ring two inches down to one inch, and if you follow the specifications the Seaboard rock and the St. Lucie rock would not be interchangeable.

Q. Where did you get that word "interchangeable"? I didn't ask you anything about that.

A. I heard it some place, evidently.

Q. Now the two and a half down to three-quarters would be with respect to size?

A. Yes, sir.

Q. And the two to one is size?

A. Yes, sir.

Q. Wouldn't the smaller circle go through the big circle?

A. Yes; but it wouldn't be up to specifications.

Q. But it would fill the specifications?

A. It wouldn't be uniformly graded.

Q. If this specification says rock smaller than two and a half inches and larger than three-quarters of an inch, wouldn't rock between 1 and 2 inches meet that specification?

A. It wouldn't be uniformly graded according to specification.

Q. I didn't ask you anything about uniform gradation. I asked you if as to size it would not fill that specification?

A. In my opinion it would.

Q. Is it your opinion that the Class "B" rock according to the Loftis specifications could not be used for ballast on the Seaboard Railway?

A. No; that is not my opinion.

Q. It could be, could it not?

A. Yes.

Q. What is your opinion as to whether or not railroad ballast comes within any of these terms that I will read you: crushed stone, construction, metallurgic, and chemical?

A. Crushed stone.

Q. Is it under any of the subheads I read to you?

A. It could be really used in construction.

Q. How about metallurgic?

A. No.

Q. And chemical?

A. No.

135 Q. Railroad ballast could be classified as crushed stone construction; is that right?

A. It could be used for crushed stone construction; yes.

Q. Do you remember anything about the quality of the ballast that was furnished to the Seaboard in 1941?

A. Something; yes.

Q. Were you familiar with the quality of the ballast that was supplied to the Seaboard to fill the 115,000 ton order?

A. Somewhat.

Q. Would you say it was a superior quality to that that had been shipped in 1941?

A. It might have been a little harder.

Q. And in that respect would it be superior?

A. Somewhat; yes.

Q. You stated in your correspondence with the Loftis Company at the outset that you did not think the Seminole Rock and Sand Company rock would meet their specifications at all, didn't you?

A. That is right.

Q. That was your opinion at that time?

A. That is right.

Q. It finally did meet their specifications, did it not?

A. Yes.

Q. And a large quantity was sold to them?

A. Yes.

Q. So your initial estimate of the situation was incorrect, wasn't it?

A. No; not necessarily.

Q. How do you explain that?

A. In order to determine whether the rock would meet the specifications or not, I had Superintendent Booth run some Seaboard ballast rock through the crusher, recrushed it and rewash it, and we tested it and then we found out it would meet the specifications, after it was recrushed, rewash, and reground.

Q. You found that it could be made to come up to these specifications?

A. Yes, sir.

Q. Did you run a stock pile for the Loftis job in January 1941 of both classes A and B?

A. Yes.

Q. Did U. S. Engineer Inspector Earl Smith come over and inspect that stock pile in January 1941?

A. That was in January 1942.

136 Q. Were you there in the months of April, May, and June of 1942?

A. No, sir.

Q. Do you know what was done with that Class "B" stock pile that was run for the Loftis job?

A. When I came back in August or the latter part of July it was on the yard.

Q. Do you know what ultimately happened to it?

A. Some of it was loaded for the Loftis job. What happened to the other part I don't know.

Q. You say that some of the stock pile that was made in January 1942 was loaded for the Loftis job in July 1942?

A. In August 1942.

Q. Did anybody else around there see that?

A. I don't know.

Q. Don't you know as a matter of fact that that Class "B" stock pile was shipped to the Seaboard for ballast?

A. No, sir.

Q. You never heard of that before?

A. No, sir.

Q. Would you say it would have been fit for ballast on the Seaboard?

A. They might have accepted it.

Q. You won't deny that it could have been used for ballast?

A. It could have been used for ballast; yes.

Q. You stated that you had some Seaboard ballast prerun to determine whether you could comply with the Loftis specifications. What do you mean by Seaboard ballast? It had not been sold to the Seaboard then, had it?

A. No; but it was in the stock pile for the Seaboard to be shipped.

Q. As a matter of fact, wasn't it just over-size rock?

A. You could call it that; yes.

Mr. ANDERSON. That is all.

Redirect examination by Mr. LICHLITER:

Q. When Earl Smith, the Engineer, was there inspecting these two stock piles, did you have at the same time a separate Seaboard ballast pile?

A. Yes, sir.

Q. At the time Mr. Smith was there prior to March of 1942 making these inspections were you shipping the Seaboard ballast out of the ballast pile or were you shipping the Seaboard ballast from one of these two Loftis piles?

A. Out of the ballast pile.

137 Q. Now you testified awhile ago in your testimony about the Loftis rock up to two inches being used for ballast, or could be used for ballast. That would be true with respect only up to the two-inch size; is that correct?

A. Yes, sir.

Q. In other words, the specifications for the Seaboard ballast were from three-quarters of an inch up to two and a half inches?

A. Yes.

Q. Could you use the Seaboard ballast for the Loftis job without additional treatment of the ballast?

A. No.

Q. You couldn't use it without additional treatment?

A. No, sir.

Q. Why is that true?

A. Because it was too big.

Q. In other words, the two and a half inch maximum size of the Seaboard ballast would not fulfill the requirement of from one to two inches?

A. It was too big and small for that.

Q. Would the Seaboard ballast have fulfilled the percentage of gradation in the Loftis job?

A. No, sir.

Q. Was there any gradation required of the Seaboard ballast?

A. Only uniformity.

Q. The Seaboard ballast, in other words, had no requirement that 97% of it had to be two inches? Did it have any such requirement?

A. No percentage requirement; just uniformly graded.

Q. Between three-quarters of an inch up to two and a half inches; is that right?

A. That is right.

Q. In August 1942, when you stated that the Class "B" ballast was shipped for the Loftis job, did you have a separate pile there for Seaboard ballast at that time?

A. Yes, sir.

Q. Were not shipments in August 1942 of the Seaboard ballast being made from the Seaboard ballast pile—or from the Loftis piles?

A. To the Seaboard from the Seaboard ballast pile.

Mr. LICHLITER. That is all.

Mr. ANDERSON. No further questions.

138. Thereupon DONALD L. HANSON, a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. LICHLITER:

Q. Will you please state your name?

A. Donald L. Hanson.

Q. Where do you reside, Mr. Hanson?

A. I live on the government reservation at St. Lucie Lake. Stuart, Florida, is my business address.

Q. What is your line of work?

A. I am an associate engineer of the United States Engineering Department.

Q. You are connected with the United States government?

A. Yes.

Q. As an associate engineer?

A. Yes, sir.

Q. How long have you been connected with the government on that work, in that capacity?

A. Since February 23, 1934.

Q. Approximately eight years?

A. This is '44. It would be approximately ten years, sir.

Q. Has that work as an engineer involved your becoming familiar with the various types of crushed stone used in construction work?

Q. Do you remember the construction of the St. Lucie dam project at St. Lucie, Florida, from the early part of 1942—through the year 1942?

A. Yes.

Q. What was your official connection with that work?

A. Resident Engineer in charge of construction.

Q. What responsibility did you have with respect to the material furnished for use in that dam?

A. I was responsible for the material incorporated in that project in accordance with the plans and specifications for that project.

Q. Was that true with respect to the rock material furnished by Seminole to Loftis?

A. Yes, sir.

Q. You were familiar with the specifications regarding that material, were you, Mr. Hanson?

A. Yes, sir.

Q. Now I believe there were two types of material or stone in that connection, Class "A" and Class "B", or do you remember that differentiation?

139 A. Well, we referred to it as Classes "A" and "B," and we had two sizes of aggregate. The coarse aggregate was from one-quarter to an inch. We referred to that as one-inch rock, and the other size was from one to two inches.

Q. I hand you herewith the Answer of the defendant, inviting your attention to the sixth defense appearing on page 9 thereof, and ask you to state whether or not the specifications there listed as Class "A" and Class "B" refer to the specifications covering the one- to two-inch rock, as you have designated it?

A. Yes.

Q. I invite your attention also to another pleading in this case to paragraph 8 of the second amended complaint, and ask you to examine that portion thereof which states the specifications of ballast shipped to the Seaboard Air Line Railway as they appear in that part of the Answer, that is, of stone ballast [hands instrument to witness]. You have examined the paper I have shown you, in which it is stated: "Stone for use in the manufacture of ballast shall break into angular fragments which range with fair uniformity between the maximum and minimum size specified," and also the last paragraph there which states: "Class 'A' Stone Ballast will range between the size which will in any position pass through a two and one-half inch ring, and the size which will not pass through a three-quarter inch ring." Those are the specifications that you have just examined; is that right?

A. Yes, sir.

Q. I invite your attention again to the Answer of the defendant herein, particularly to the specifications as listed on page 9 of the Answer with respect to Class "B" stone, the stone which you have referred to as the one- to two-inch stone, and ask you to state whether or not stone of the specifications of the Seaboard ballast would fulfill the specifications for the Class "B" stone?

A: They would not.

Q. Would the stone which fulfilled the ballast specifications be suitable for use to fulfill the specifications of this Class "B" stone which you have just examined?

A. No, sir.

Q. Why is that true?

A. It appears to me that the specifications there for ballast would be too flexible to meet the strict requirements of the specifications for the one- to two-inch stone.

Q. What is the difference between the ballast specifications with respect to uniformity and the Class "B" Loftis specifications with respect to the proportionate gradation of stone sizes?

140 A. The specifications for the St. Lucie rock project or dam project specified specific screening within limits of a certain specific percentage.

Q. And what did the ballast specifications provide with respect to the difference in size?

A. They specified a uniform gradation that would not limit the specific quantity to a specific screening as set in the St. Lucie project specifications.

Q. In other words, the uniform gradation or uniform distribution as the Seaboard ballast has would not fulfill the definite proportionate gradation or requirement necessary in the Class "B" rock; is that true?

A. That is true.

Q. Referring to this Class "B" rock again, I invite your attention to that portion of the specifications which says: "Class B. Passing Screen 2", 97-100%; Screen 1½" passing screen, 40-70%; Passing Screen 1", 0-6%." Are these proportionate distributions necessary to be fulfilled to comply with specifications for that type of rock?

A. Yes, sir; for the purpose for which they were written into the specifications.

Q. You of course know the purpose for which ballast rock is used in connection with railroads, do you not?

A. Yes, sir.

Q. Would ballast rock be a type of construction stone used in the construction of a railroad? In other words, would you call ballast stone applicable or usable in the construction and maintenance of a railroad?

A. Well, they use crushed stone as ballast in the construction and maintenance of a railroad; yes.

Q. In other words, it would be crushed stone of that particular type as used in the construction and maintenance of a railroad?

A. Yes, sir.

Mr. LICHliter. You may inquire.

Cross-examination by Mr. ANDERSON:

Q. Which was the more rigid specification, the Loftis specification or the Seaboard ballast specification?

A. The Loftis specification.

Q. You could use rock that conformed to the Loftis specifications for railroad ballast, could you not?

A. Not under the specifications.

Q. I am not asking you anything about the specifications. You can answer my question yes or no. You are an engineer and you should be able to answer my question. You could use
141 the Loftis rock according to the specifications in the Loftis contract for railroad ballast, couldn't you?

A. Provided it met the specifications for the ballast for which it was intended to be used.

Q. I am asking you a simple question, if you couldn't take that construction stone that conformed to the specifications in the Loftis contract and put it in a roadbed of a railroad and use it for ballast?

Mr. LICHLITER. I object to that, if the Court please, on the ground that it is immaterial, and on the further ground that the witness has already answered the question in the negative.

The Court. The objection is overruled. Answer the question, if you can.

A. Yes.

Mr. ANDERSON. That is all.

Redirect examination by **Mr. LICHLITER**:

Q. The Loftis rock would not fulfill the two and a half inch requirement of the Seaboard ballast; is that true?

A. That is true.

Q. Now going back for just a moment to the specifications for the ballast. I believe you read in the ballast specifications that it shall range with fair uniformity between the three-quarter inch size and the two and a half inch size. Is that one of the requirements of the ballast that you read?

A. Yes, sir.

Q. Now is that uniformity essentially different from the proportionate gradation required in the Loftis stone; in other words there is a uniformity between the maximum and minimum in the railroad ballast and there is no uniformity in the Loftis rock; is that true?

A. That is true.

Mr. LICHLITER. That is all.

Re-cross examination by **Mr. ANDERSON**:

Q. Did you have an inspector there by the name of Earl Smith on the job at the Seminole plant?

A. Yes.

Mr. ANDERSON. No further questions.

Thereupon **GEORGE E. WINGERTER**, a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination by **Mr. LICHLITER**:

Q. Please state your name.

A. George E. Wingerter.

142 **Q.** Where do you live, Mr. Wingerter?

A. At the present time in Miami, Florida.

Q. How long have you lived there?

A. Since the first of May 1942.

Q. What is your business?

A. I am vice president and manager of the H. C. Nutting Company, with offices in Cincinnati, Ohio, and Miami, Florida.

Q. What is the business of the Nutting Company?

A. We are a chemical testing laboratory, primarily concerned with the testing of building and construction materials prior to their use in construction projects and also investigation of materials prior to their production.

Q. Have you been engaged in such work, making such tests yourself, Mr. Wingerter?

A. Yes.

Q. How long have you been connected with the Nutting Company?

A. I started with the Nutting Company in June 1923.

Q. Has your work been continuous with them since?

A. It has.

Q. Has your work involved the making of tests of crushed stone products?

A. It has.

Q. Has it involved making tests of railroad ballast?

A. It has.

Q. And stone of that type?

A. Yes.

Q. Have you before you your company's record involving a sample of ballast rock which was submitted to the H. C. Nutting Company in the month of February 1942? Do you have that record with you?

A. Yes, sir. It is on the table there. Shall I get it?

Q. Yes. Is this the report, Laboratory number 5127 covering order number M-1425?

A. Yes.

Q. Is that a permanent record of the Miami office of the H. C. Nutting Company, dated March 3, 1942?

A. It is.

Q. Does that represent a copy of a report of a test that was made in the due course of business of that company?

A. It does.

Q. By whom is that report signed?

A. By my predecessor, Mr. F. E. Miller.

Q. Is Mr. Miller not now connected with the H. C. Nutting Company in Miami?

143 A. Mr. Miller is in military service of the United States.

Q. And you succeeded him as branch manager?

A. I came down to Miami to find a manager and I found it very difficult, so I stayed on.

Q. Has that record there before you been a part of the original records of the H. C. Nutting Company's Miami office since Mr. Miller departed?

A. It has been.

Q. Has it been in your custody or subject to your control?

A. It has.

Q. Does that record represent a copy of a gradation test of ballast rock that was submitted by the Seminole Rock and Sand Company on the date which it bears?

A. It does.

Q. Have you produced here and have before you an executed copy or original copy of the record which you have been testifying about?

A. Yes.

Mr. LICHETER. We wish to offer this in evidence at this time, may it please your Honor.

Mr. ANDERSON. I am not disposed to interpose technical objections, but I do not see how this thing either helps or hurts. I pass up the point that it has not been properly authenticated. The fact that he came into the office that had been run by another man and found this thing there, does not establish its authenticity. If it were more material, or material at all, I would probably object to it; but under the circumstances I am inclined to let it go in. I merely make that observation to put him on notice that if he has anything that I consider vital, I am going to make that objection.

The Court. Let it be marked.

(Said instrument was marked "Plaintiff's Exhibit B" and appears at R. 185, infra.)

Q. I understood you to say that this is a part of the records of your company kept in the due course of business?

A. Yes.

The Court. It is already in evidence. Proceed.

Q. Will you please look at the instrument which has been marked "Plaintiff's Exhibit B" and state what it is?

A. It is a report on a test sample of ballast rock furnished by a representative of the Seminole Rock and Sand Company on February 26, 1942.

Q. Does the instrument before you show the result of the test of that rock?

A. It shows the result of a gradation test.

144 Q. Just state what the report shows as the result of the grading test.

A. It shows 100% passing the three-inch sieve; 56.3% passing the 1½" sieve; 63.8% passing the 1½" sieve; 17.5% passing the 1" sieve and 1.3% passing the ¾" sieve.

Q. State briefly the substance of the mechanical process involved in making that gradation test, according to the usual practice of your company in the tests that you have made.

A. It consists of a prepared sample prior to running an analysis, that is, by drying it thoroughly and weighing it, and then after drying the ballast it is put on a nest of sieves. The nest of sieves in this case included three inch, two inch, one and a half inch, one inch, and three-quarters of an inch. Then we shake these sieves until it goes through to the bottom, and then the sample is weighed individually on each sieve to arrive at our percentage passing.

Q. In other words, 100% of that sample that was submitted in this particular case would go through a ring of three inches; is that right?

A. In this case; yes.

Q. Through the three-inch sieve?

A. Yes, sir.

Q. All of it would go through that?

A. Yes.

Q. 56.3% would go through a screen of two inches; is that right?

A. Yes, sir.

Q. And the other gradations are shown on that report, 63.8% on the one-and-a-half-inch screen; 17.5% on the one inch, and $\frac{1}{3}$ % passing the $\frac{3}{4}$ " sieve?

A. That is right.

Q. Is it the custom of your company, when these specimens are received, to have the person submitting them designate the type of rock and give the instructions for the test?

A. Yes, sir.

Q. This is called ballast rock; is that true?

A. Yes, sir.

Q. Now I invite your attention to the specifications as shown in the exhibit of the defendant filed herein, of certain rock which has been referred to as Class "B" rock furnished on the St. Lucie dam project, and I ask you to look at these specifications of Class "B" rock, ranging from one to two inches, and state whether or not the ballast rock as shown by the gradation tests that you have just testified about, would fulfill these Class "B" specifications?

A. No, it would not; not on the top side.

145 Q. Just what do you mean by that?

A. In this particular instance the ballast rock is coarser than the Class "B" rock specified in these specifications.

Q. In other words, all of this rock, according to the gradation tests which you testified about, would go through a three-inch screen sieve; is that true?

A. Ballast rock?

Q. Yes.

A. That is right.

Q. What was your observation on the Loftis specifications as to what percentage of $1\frac{1}{2}$ " rock is necessary to fulfill it? What percentage is stated there?

A. 40-70%.

Q. Now as passing the $1\frac{1}{2}$ " sieve, what did you observe on the ballast test rock?

A. 63.8%.

Q. Then the 63.8% would fulfill the $1\frac{1}{2}$ " requirement?

A. It would.

Q. With respect to the higher points the one to two and the three inch sieve, it would be higher—

A. The material would be too coarse as far as the grading is set forth here.

Q. You are referring to the ballast material?

A. That is right.

Q. The ballast material would be too coarse to fulfill the Class "B" specifications of the Loftis job?

A. Correct.

Q. Do you have a further report of a gradation test that was made in the month of September 1943 by the H. C. Nutting Company? The number of the report is 1425. That is the order number.

A. What is the laboratory number?

Q. 1859.

A. Yes; I have it.

Q. Did you run that test yourself?

A. No; but I signed the report. Two technicians in the laboratory made the test.

Q. Does that involve a gradation test of the same character as you have just identified with respect to the test made in March 1942?

A. It is practically the same thing, with the exception that we went a step further here. On this report we have the percentage of wear and bulk specific gravity tests.

Q. You made a specific gravity test in addition to the gradation test. Is that the only difference?

A. Yes.

146 Q. I show you this instrument and ask you if that is an executed copy of that test report as appears in your company records?

A. Yes. The only thing wrong is that the report number is incorrect.

Q. Did you sign the original of that report which you have before you?

A. I did.

Q. The report before you is a part of the company records and it has been subject to your control and custody?

A. Yes, sir. There is a note on the bottom of this report that is not on my original report.

Q. Other than that endorsement there, it is an executed copy of the company record before you?

A. That is right.

Q. By whom was the gradation test run? Does the report indicate which employee of your company ran it?

A. No.

Q. But it does represent a gradation test made by one of the employees of the Nutting Company?

A. Yes. The laboratory records would indicate that, however.

Q. The original laboratory records would indicate the name of the man making the test?

A. That is right.

Mr. LICHLITER. I offer it in evidence.

Mr. ANDERSON. I make the same observation with reference to this one that I made to the other one. The other exhibit, your Honor, on which we consumed so much time, proves at most this: that the Seminole Rock and Sand Company at sometime in February 1942 (which date in February is beyond the pale) had some rock that did not meet the specifications for the Loftis job. Now I assume that, and, as a matter of fact, the witness Smith, the inspector of the U. S. Engineer's office, so testified, so I don't see where we are going with that kind of proof.

Mr. LICHLITER. It is designated railroad ballast, and that is our purpose in introducing it.

The Court. Let it go in for what it is worth.

(The said instrument was marked "Plaintiff's Exhibit 'C'" and appears at R. 185, *infra*.)

Q. Does that represent the result of a gradation test of an actual sample submitted by the Seminole Rock and Sand Company?

A. It does.

147 Q. What is the usual practice followed by the Nutting Company in receiving these samples? What is the usual size of the sample that is submitted in that connection; about how much does it consist of, the extent of the sample for analysis?

A. Fifty pounds or more.

Q. With a sample of that size the test was run?

A. Yes.

Q. What does that report show, briefly?

A. It shows that the sample was submitted for a grading test and in this instance the sieves were three inch, two inch, one and a half inch, and one inch. It shows further 93.2% passing three-

inch sieve; 58.5% passing the two-inch sieve; 23.7% passing the one and a half inch sieve, and 5.4% the one-inch sieve.

Q. I invite your attention to the Class "B" specifications for the Loftis contract and the result of the gradation test as shown by the test that was made of this sample that was submitted as railroad ballast, and ask you to state whether or not the sample submitted as railroad ballast would fulfill the Loftis Class "B" specifications?

A. Too coarse.

Q. It would be too coarse?

A. Yes.

Q. The date of this last test that you have identified is what?

A. The sample was submitted September 23, 1943.

Q. What is the designation as it appears at the top there?

A. Tests on Railroad Ballast.

Q. What is the rest of it?

A. Sample submitted by Mr. Plath of the Seminole Rock and Sand Company.

Q. On what date?

A. September 23, 1943.

Mr. LICHLITER. You may inquire.

Cross-examination by Mr. ANDERSON:

Q. On this last test, marked "Plaintiff's Exhibit 'C,'" tell me what the specific gravity was.

A. 2.437.

Q. What specific gravity was that?

A. Bulk specific gravity.

Q. What is the difference between bulk specific gravity and apparent specific gravity?

A. In the industry bulk is used primarily in the concrete industry in order to obtain the most absolute dense mixture.

Q. Can you tell me from that test what would be the apparent specific gravity?

148 Mr. LICHLITER. I object to that question about specific gravity because it affirmatively appears that specific gravity is not concerned with nor is it a requirement of Seaboard ballast.

A. I might say—

The COURT. Let it go in for what it is worth.

A. As I started to say, it would be guessing.

The COURT. Then we won't guess.

Q. Let's see if you can do something better than guessing. I don't want you to guess, either. You have examined a good many samples of the Seminole products during the past 18 months or so; is that true?

A. Yes.

Q. Based upon that experience and your familiarity with their products, can you estimate what would be the apparent specific gravity?

Mr. LICHETER. I object on the further ground that it appears that any answer the witness might make would be a guess.

The Court. Overruled.

A. It would run somewhere around 2.50.

Q. It would be in excess of 2.45?

A. Yes, sir.

Q. Refer again to Class "B" specifications for what we have called the Loftis rock. Read it from page nine of the defendant's Answer and just familiarize yourself with it once more. You have examined many samples of the Seminole product in the last year or so?

A. That is true.

Q. Have you found that it conformed to that specification?

A. I can answer that a little differently.

Mr. LICHETER. I object to the question on the ground that it is too indefinite. It does not refer to what products of the Seminole Rock and Sand Company he has examined. If it refers to Loftis rock, that is one thing, and if it refers to Seaboard ballast, it is another. The question is too indefinite, in the absence of showing the specific test that was made and the specific sample submitted.

The Court. Overruled. Answer the question.

A. I don't recall testing any material for the O. P. Loftis specifications. Most samples were submitted to us without the specifications, and that would make it difficult to answer your question.

Q. Perhaps I did not make myself clear. Disregard for the moment the fact that they were selling rock to Loftis. What I am attempting to bring out from you is this: that the Seminole
149 Rock and Sand Company had rock samples which you examined that would conform to that specification?

A. Without looking at the records, I could not answer that question.

Q. You can't?

A. Their intent has been to meet specifications.

Q. Haven't they done so?

A. In a great many cases, yes.

Q. When they send you a sample of rock do they tell you what specifications they are trying to meet?

A. In some instances.

Q. And when they don't, how do you know what the specifications are that they are trying to meet?

A. We don't know. Numerous reports will just give the test and they form their own opinion apparently then from the specifications at hand.

Q. Don't you know as a matter of fact that the Seminole Rock and Sand Company has sent your company numerous samples in the past year or so that you examined and that would meet a specification of that kind, regardless of whether it was Loftis rock or not?

Mr. LICHLITER. I object to the—

The COURT. Overruled.

A. I don't believe so. Of course I am going on memory, and if you have such records, that is something else. I am just drawing on my memory.

Q. You drew on your memory when you remembered that you found these records in the office of your former manager?

A. Not on my memory. The reports were in the files and when I was asked to produce them, they were drawn out.

Q. You don't think, if you drew on your memory, that you could recollect definitely whether you had examined rock of the Seminole Rock and Sand Company that met that specification?

A. Two-inch rock in the Miami area, according to my recollection, has not been used a great deal in concrete work. I have been down here only a short time. The predominant size rock used is commonly known as "three-quarters."

Q. You have examined a great deal of rock in the Miami area to determine its apparent specific gravity?

A. Yes, sir.

Q. Hasn't it been your experience that most of the rock in the Miami area when tested for apparent specific gravity tests more than 2.45?

A. Yes; I believe so.

150 Q. These matters of gradation and so on simply involve getting the rock to a certain size?

A. Yes, sir.

Q. If the rock that was examined in this sample shown in your Exhibit "C" did not pass certain specifications as to gradation, that would not mean that that rock could not be crushed so as to meet the specifications?

A. Not at all.

Q. Now I want to hand you against your Exhibit "C" and ask you one further question: Insofar as specific gravity, apparent specific gravity, of the rock that was tested in that sample is concerned, would it meet a specification which I will now read to you: "Coarse aggregate shall be washed gravel or crushed stone, having an 'apparent' specific gravity of not less than 2.45."

A. It would.

Mr. ANDERSON. That is all.

Redirect examination by Mr. LICHLITER:

Q. Referring to the first one you examined in March 1942, there was no request to make a specific gravity test in that test, is that true?

A. It is.

Q. And this one made in March shows no specific gravity test?

A. No.

Q. You were asked a question a moment ago about the stone of the maximum size being capable of meeting the lower specification, that is, the two-inch specification. It is correct to say, it is not, that before any stone of the three-inch maximum could meet the one- to two-inch specification it would be necessary to crush that stone or apply some mechanical process to it?

A. Yes.

Q. In order to get it comparable on gradation to the one- to two-inch specification, there would have to be some mechanical process; is that true?

A. That is right.

Mr. LICHLITER. That is all.

Thereupon E. M. HUTTO, a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. LICHLITER:

Q. What is your name?

A. E. M. Hutto.

151 Q. Where do you live?

A. West Palm Beach, Florida.

Q. What is your position there?

A. Roadmaster for the Seaboard Air Line Railway.

Q. How long have you occupied that position?

A. Since 1930.

Q. Continuously up to the present time?

A. Yes, sir.

Q. Did you occupy that position during the month of March 1942?

A. Yes.

Q. During the month of March 1942, from the beginning of that month, up through the month of August 1943, did you from time to time receive cars of railroad ballast consigned to you from the Seminole Rock and Sand Company?

A. Yes, sir.

Q. What was your control over that ballast; what did you have to do with it?

A. Look after the unloading and placing of it, and check the quality and quantity of the ballast received.

Q. In March 1942 and prior thereto I take it that you were familiar with the specifications for Class "A" railroad ballast?

A. Yes, sir.

Q. What was the maximum and minimum size?

A. The maximum was two and a half inches and the minimum was three-quarters of an inch.

Q. Meaning that the stone would have to be such as to pass through rings of that size, two and a half and three-quarter inch rings?

A. Yes.

Q. In the month of March 1942 and prior thereto what was the tendency of the ballast that you received to conform to those specifications as to the maximum size? Did you receive any appreciable quantity of it over the maximum?

A. Yes; we received some over the maximum.

Q. Did that condition obtain in the month of March 1942?

A. Yes, sir.

Q. And prior thereto?

A. Yes, sir.

Q. State just generally what you observed as to the size of the ballast over the two and a half inch maximum that they furnished?

A. Some of it would range anywhere from four to six inches and some would run from seven to eight inches in diameter.

Q. That was the substance that you received as ballast?

152 A. Yes, sir.

Q. Did that condition continue after March 1942?

A. No, sir; it was better.

Q. After the month of March 1942, did you still observe some larger sizes?

A. Yes.

Q. But not perhaps as much as there had been before; is that true?

A. Yes, sir.

Q. What can you say as to the general condition of the ballast that you received as Roadmaster subsequent to March 1942 and up through the month of August 1943? Was it substantially the same as you were getting on or about March 1942?

A. It seemed to be a little more uniform in size.

Q. Somewhat more uniform?

A. Yes, sir.

Q. You mean as grading between the maximum two and a half inches and the limit of three-quarters of an inch?

A. That is right.

Q. Did it still have some of the larger pieces in it?

A. Yes; occasionally there would be some.

Q. All of this ballast that you have been testifying about from March 1942 on was used in the maintenance of the roadbed of the Seaboard Air Line Railway?

A. Yes, sir.

Mr. LICHLITER. That is all. If your Honor please, that concludes the plaintiff's case.

Mr. ANDERSON. I offer in evidence a letter from V. P. Loftis Company to the Seminole Rock and Sand Company, dated September 10, 1941, marked "Defendant's Exhibit 1" for Identification, together with the attachment thereto.

Mr. LICHLITER. We object to the instrument on the same grounds as set forth in the record herein with respect to any evidence introduced concerning the Loftis contract or the type of construction material involved, on the ground that it is immaterial and irrelevant, and it is not the same type of ballast involved in this case. I object on the further ground that any offering price concerning the stone in the Loftis construction contract would be immaterial and irrelevant.

The COURT. The objection is overruled.

(Said instrument was marked "Defendant's Ex. No. 1" and appears at R. 186, infra.)

Mr. ANDERSON. I now offer in evidence a copy of a letter dated November 27, 1943, that I wrote to Mr. Chauncey W. Butler, State Director of OPA, Barnett National Bank Building, Jacksonville, Florida. Counsel, I am sure, has a copy of

153 this letter. I offer it with particular reference to the suggestion that was made at the last hearing that the Seminole Rock and Sand Company had not undertaken to secure any adjustment of its prices under the regulations. I do not mean to say that this follows the precise formality required by whatever regulation might have been in effect, but I do mean to say that it constitutes a request to the OPA for an adjustment of the price ceiling. I offer it in evidence for that purpose, and I would like to read it to the Court.

Mr. LICHLITER. We object to the introduction of the letter on the ground that it is immaterial and entirely irrelevant; it has no bearing on the issues and it is also argumentative; it affirmatively appearing that the letter was written subsequent to the institution of the present suit, and on the further ground that the method of securing an adjustment in price is provided by Maximum Price Regulation 188.

The COURT. Overruled.

Mr. ANDERSON. Then I would like to testify. Swear me.

Thereupon R. H. ANDERSON, a witness for the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Mr. ANDERSON. My name is Robert H. Anderson. I practice law in Miami, Florida, and I represent the Seminole Rock and Sand Company in this litigation. After it was commenced I sought an interview with officials of the OPA, looking to a possible means of making provision for the continued furnishing by Seminole Rock and Sand Company of ballast to the Seaboard Railroad notwithstanding the litigation. Mr. Butler, the State Director of the OPA, gave us that interview. We had it in the OPA offices in Miami. Refreshing my recollection from a letter, a copy of which I have in my hand, the interview was shortly prior to November 27, 1943. There were present Mr. Butler, Mr. Cecil Liehliter, an attorney whom I have known for many years, Mr. P. N. Hiatt, the local enforcement attorney in Miami, and Mr. Arnold, investigator of the OPA, who signed the affidavit attached to the complaint, and Mr. Arnold has testified in this case. Also present were Mr. R. G. Lassiter, president of the Seminole Rock and Sand Company, Mr. James W. Brushwood, Treasurer of the company, who testified in this case, and Mr. McCarthy, my partner. There may have been others present. At that hearing it was suggested that some means might be adopted whereby the company
154 could be permitted to continue to supply the ballast, and the question of its liability, if any, for treble damages under the statute, would be relegated to the Courts for decision and determination. Mr. Butler, who was exceedingly courteous and exceedingly cooperative, asked me to put my views in writing, which I did. I wrote him a letter under date of November 27, 1943, a copy of which I have here, and he acknowledged receipt of it under date of December 1, 1943, the original of which I have in my file. Mr. Butler did everything that he could, I am sure, to carry out any commitments that he made to work out the problem, but he later advised me that in spite of his efforts he found it impossible to do so. I proffer this letter as tending to show the efforts that the Seminole Rock and Sand Company made to get the price adjusted and the effort of the OPA board to cooperate with it in accomplishing that purpose. So I again offer the letter in evidence.

Mr. LIEHLITER. I urge the same objection, if the Court please, on the ground, particularly, that Regulation 188 had provided a means of securing an adjustment.

The Court. I will sustain the objection.

Mr. ANDERSON. Then I offer it for identification. Mark it for identification.

(Said letter was marked "Defendant's Exhibit No. 2" for Identification.)

Mr. LICHLITER. No questions.

(Hearing concluded.)

STATE OF FLORIDA,
County of Dade.

I hereby certify that the foregoing transcript is a true and correct transcript of the proceedings had and testimony taken in the foregoing cause at Orlando, Florida, on March 27-28, 1944.

Dated at Miami, Florida, this 22nd day of May A. D. 1944.

H. E. COLMAN,
Official Court Reporter.

On March 27, 1944, Stipulation on Admission in evidence of certain documentary proof was filed in evidence at Orlando, Florida, as Plaintiff's Exhibit 1, in words and figures as follows, to-wit:

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Plaintiff's Exhibit 1

Stipulations Between Counsel for Plaintiff and Defendant Upon Admission in Evidence of Certain Documentary Proof.

STIPULATION

It is stipulated and agreed by and between counsel for plaintiff, Chester Bowles, as administrator, Office of Price Administration, and counsel for defendant, Seminole Rock and Sand Company, a Corporation, with respect to trial of the above and foregoing cause at Orlando, Florida, beginning March 27, 1942, as follows:

(1) That the defendant waives the demand for jury trial as set forth in its answer and the pleadings herein entitled "Demand for Trial by Jury" and consents that all factual issues be determined at such trial by the Presiding Judge thereof, it being understood and agreed, however, that in the event of a new trials being awarded by appeal or otherwise from all or any part of the decision or order that may be rendered by the Presiding Judge in the trial scheduled as aforesaid, that the defendant may renew the demand for a jury trial, as the same now appears in the Pleadings, to such extent as the defendant may then be entitled under the issues to be determined.

(2) That there be received in evidence herein as Exhibit A of plaintiff eleven (11) typewritten sheets bearing the following caption on the first page thereof:

"SEABOARD AIR LINE RAILWAY

"Statement Showing Miami Native Rock Ballast Purchased by Receivers of Seaboard Air Line Railway from Seminole Rock and Sand Company, Address P. O. Box 3232, Miami, Florida, terms net F. O. B. Plant Hialeah, Florida. Ballast Purchased During Period March 1, 1942, to May 28, 1943, Inclusive;"

and that the shipments of ballast listed on said sheets were actually sold and delivered by the defendant to the Receivers of Seaboard Air Line Railway, L. R. Powell, Jr., and H. W. Anderson, under the invoices, of the dates, purchase orders and requisition numbers, and at the prices per ton, as shown by the sheets in question, and that the defendant received in payment from the said Seaboard

Receivers the amounts for the sale and delivery of said ballast at the prices per ton shown in said sheets and as covered by the voucher numbers and dates of payment as therein listed. Photostatic copies thereof have been filed with this court; see stipulation in re printing, R. 200.)

(3) That the defendant admits the following listed documents to be true copies of the respective original papers as they purport to be and that such copies may be introduced in evidence by plaintiff with the same evidentiary force and effect as original instruments; that in the case of letters and telegrams, it is admitted and stipulated that originals of the instruments, evidenced by the several copies hereafter noted, were signed as they purport to be and transmitted by mailing, or by telegraph, in due course of correspondence and were actually received by the person or Corporation to which such originals were severally directed and addressed.

Exhibit A-1 being day letter CAK 32-272, dated Norfolk, Va., October 31, 1941, from J. L. Brown, Purchasing Agent, to Defendant, Seminole Rock and Sand Company.

Exhibit A-2 being letter dated November 1, 1941, signed by J. R. Rankin, Sales Manager of defendant, addressed to said J. L. Brown.

Exhibit A-3 being signed copy of purchase order to defendant, dated November 6, 1941, signed by said J. L. Brown, covering requisition No. NF-101270, Order No. P1012197-C-33, for 5,000 tons of ballast.

Exhibit A-4 being signed copy of purchase order dated March 3, 1942, to defendant, signed by said J. L. Brown, covering requisition No. NF-22153, Order No. P221546-C-26, for 28,500 tons.

Exhibit A-5, Western Union Telegram, dated March 4, 1942, to defendant, signed by J. L. Brown, Purchasing Department, Seaboard Air Line Railway.

Exhibit A-6 being a letter March 6, 1942, Miami, Florida, from defendant, signed by J. R. Rankin, Sales Manager to said J. L.

Brown, together with copy of notice, as printed in Miami Daily News, March 3, 1942, referred to in said letter.

Exhibit A-7, telegram dated March 9, 1942, CAK 3372, signed J. L. Brown, Purchasing Agent, Seaboard Air Line Railway, to the defendant.

Exhibit A-8, letter dated March 9, 1942, from said Brown to defendant.

Exhibit A-9, letter dated March 10, 1942, signed by J. R. Rankin as Sales Manager of the defendant, addressed to said J. L. Brown.

Exhibit A-10, telegram April 11, 1942, Norfolk, Va., CAK 3372, signed by said J. L. Brown as Purchasing Agent to defendant.

157 Exhibit A-11, Purchase Order dated April 17, 1942, signed J. L. Brown, Purchasing Agent, addressed to defendant covering Reqn. NF 4285, Order No. 42910-C-33, for 8,000 tons.

Exhibit A-12, Western Union Telegram April 21, 1942, from defendant, addressed to said J. L. Brown, Purchasing Agent.

Exhibit A-13, telegram April 21, 1942, CAK 3372, to defendant from said J. L. Brown.

Exhibit A-14, telegram April 28, 1942, to defendant from J. L. Brown, Purchasing Agent.

Exhibit A-15, telegram April 30, 1942, from defendant to said J. L. Brown.

Exhibit A-16, Day letter April 30, 1942, CAK 3372 to defendant from said J. L. Brown.

Exhibit A-17, Purchase Order from said J. L. Brown, addressed to defendant, April 30, 1942, for 100,000 tons of ballast.

Exhibit A-18, letter July 3, 1942, to defendant from said J. L. Brown, Purchasing Agent.

Exhibit A-19, purchase order July 7, 1942, Order No. P724015-C-33 Reqn. CEMW 723-M signed by said J. L. Brown to defendant for 115,000 tons.

Exhibit A-20, Western Union telegram July 11, 1942, from defendant to said J. L. Brown.

Exhibit A-21, letter July 20, 1942, from defendant by R. J. Lassiter, President, to said J. L. Brown.

Exhibit A-22, Western Union telegram October 1, 1942 CAK 3372 to defendant from said J. L. Brown.

Exhibit A-23, telegram October 3, 1942 CAK 3372 from J. L. Brown to defendant.

Exhibit A-24, Western Union Telegram October 5, 1942 from defendant to said J. L. Brown, Purchasing Agent.

Exhibit A-27, Invoice No. 1009 March 16, 1942 from defendant to Seaboard Air Line Railway covering Contract No. N. F. 101270—51.65 tons of ballast @ 60¢ per ton, \$30.99.

Exhibit A-28, invoice No. 2339 September 29, 1942 from defendant to Seaboard Air Line Railway covering Purchase Order P424043—74.95 tons of ballast @ 75¢ per ton, \$56.21.

Exhibit A-29, Invoice No. 2997 December 11, 1942 from defendant to Seaboard Air Line covering Purchase Order P424043—658.05 tons of ballast @ 85¢ per ton, \$559.34.

Exhibit A-30, Invoice No. 3919 May 17, 1943 from defendant to Seaboard Air Line Railway covering purchase order P724015—25.05 tons of ballast @ \$1.00 per ton, \$251.05.

Exhibit A-31, letter August 28, 1941 from defendant by J. R. Rankin, Sales Manager, to V. P. Loftis Contracting Company.

Exhibit A-32, letter Sept. 22, 1941 from defendant by J. R. Rankin, Sales Manager, to V. P. Loftis Company.

158 Exhibit A-32-1, Aggregate Analysis Report V. P. Loftis Co., LAB. No. A-58 covering sample submitted by Seminole Rock & Sand Co. January 12, 1942, to be used at St. Lucie Rock & Dam, Stuart, Fla.—date of report being Jan. 15, 1942.

Exhibit A-33, Aggregate Analysis Report dated Dec. 29, 1941 of laboratory specimen No. A-47 covering aggregate sample submitted for analysis by defendant December 17, 1941.

Exhibit A-34, Aggregate Analysis Report dated Dec. 30, 1941 of laboratory specimen No. A-49 covering aggregate sample submitted for analysis by defendant December 23, 1941.

Exhibit A-35, Report of J. R. Payton, Principal Engineer, submitted with and commenting upon the last two listed analysis reports A-47 and A-49.

Exhibit A-36, letter V. P. Loftis Company by C. H. Combs February 19, 1942 to defendant, Seminole Rock & Sand Co.

Exhibit A-37, letter June 17, 1942 from V. P. Loftis Co., Stuart, Fla. by J. C. Kellog, to defendant, Seminole Rock and Sand Co.

Exhibit A-38, Tabulation of Order Commitments of defendant as of March 11, 1942 with inventory of same date.

Exhibit A-39, Tabulation of Order Commitments of defendant as of March 24, 1942 with inventory of same date.

It is understood that the defendant by the above Stipulation reserves the right at trial to object to any of the documents covered by this stipulation on the grounds of immateriality or irrelevancy but not pertaining to the competency thereof or method of proof.

Dated at Miami, Florida this 17th day of March 1944.

C. H. LICHLITER,

C. H. Lichliter,

Of Counsel for Plaintiff.

LOFTIS, ANDERSON, SCOTT, MCCARTHY
& PRESTON,

By ROBERT H. ANDERSON,

Attorneys for Defendant.

159 COPIES OF DOCUMENTS LISTED IN PROPOSED STIPULATION OF
COUNSEL IN CASE OF BOWLES, AS ADMINISTRATOR VS. SEMI-
NOLE ROCK AND SAND COMPANY, No. 896-M-CIVIL, U. S.
DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, MIAMI
DIVISION

Exhibit A-1

[Copy]

DAY LETTER

NORFOLK, VIRGINIA, *Oct. 31st, 1941.*

CAK 32272.

P-1012197-C-33

SEMINOLE ROCK AND SAND CO.,

Miami, Fla.

Enter order P-1012197 for five thousand tons Miami native
rock to be shipped when called for by Division Engineer Tra-
phoner and loaded in SAL hopper bottom cars. Acknowledge.

J. L. BROWN, 3:44 PM.

cc. Mr. T. R. Traphoner.

cc. Mr. T. A. Hodges.

Your H-161. Per conversation with Mr. Seawell. This will
be covered by requisition NF-101270.
fgf-vah.

Exhibit A-2

[Copy]

SEMINOLE ROCK & SAND CO.

MIAMI, FLA.

Nov. 1, 1941.

Mr. J. L. BROWN,

Purchasing Agent.

Seaboard Air Line Ry., Norfolk, Va.

DEAR MR. BROWN: We are in receipt of your wire yesterday
placing order P-1012197 for 5,000 tons Miami native rock bal-
last, to be shipped when called for by Division Engineer Tra-
phoner and to be loaded in S. A. L. hopper bottom cars.

160 We wish to thank you for this order and assure you that
we appreciate the business you have given us this year and

152 CHESTER BOWLES VS. SEMINOLE ROCK & SAND CO.

you can rest assured that you will have our full cooperation in the handling and loading of the above order.

Yours very truly,

SEMINOLE ROCK & SAND CO.,
By (S) J. R. RANKIN, *Sales Mfg.*

Exhibit A-3

[Copy]

Reqn. Number NF-101270. Order Number P-1012197-C-33.
11-6-41 H. Nov. 10th, 1941. ewl.

SEMINOLE ROCK AND SAND COMPANY, *Miami, Fla.*

Purchase Department's File Copy of Purchase Order

5,000 tons spl. Miami native rock. Price \$0.60 per net ton.
F. O. B. cars SAL Rwy. tracks. To be loaded and shipped as
called for by Division Engineer in SAL Ry. cars. Load in SAL
hopper bottom cars. Confirming wire order placed by our Pur-
chasing Department. Route via SAL Rwy.

Note—This order confirms my wire 10-31-41 and your letter
11-1-41. Do not duplicate.

Confirming phone conversation with Mr. Ford to place order
by wire with Seminole Rock and Sand Co., Miami, Fla.

J. R. Traphoner. Order P-1012197-
C-33 NF-101270. 6.

Charges: MW&S.
Required for 10-31-41.
Reqd. Date JKL.
Appv'd. by —

Exhibit A-4

[Copy]

Reqn. Number NF-22153. Order Number P-221546-C-26-33.
2-25-42. March 3rd, 1942. ewl.

SEMINOLE ROCK AND SAND COMPANY, *Miami, Fla.*

Purchase Department's File Copy of Purchase Order

28,500 tons 17-40 Class A Miami rock ballast, spec. MW&S
304. To be loaded in SAL hopper bottom cars. Delivery—
To be shipped as called for by Division Engineer.

161 Price, \$0.60 per net ton.
F. O. B., cars SAL Ry. tracks.
Delivery, See above.
Terms, Please advise.
Route, via SAL Rwy.

Court Order 300.

J. R. Traphoner, Jacksonville,
Fla. 33.
Sec. 1. Order P-221546-C-26
NF-22153. 6.

Charges: F-3507, F-3508
Required for.
Reqn. Date 2-19-42.
Approved by J. L. Kirby.
(S) T. A. Hodges.

Exhibit A-5

[Copy]

WESTERN UNION TELEGRAPH CO.

NORFOLK, VA., March 4, 1942.

P-221546-C-26

SEMINOLE ROCK AND SAND COMPANY, Miami, Florida.

Sent you yesterday order for 28,500 tons ballast to be shipped as called for by Division Engineer which we expect begin latter part April or First May and complete at rate approximately 30 cars per day if possible. Advise if you will be able furnish accordingly.

J. L. BROWN.

CAK 3372.
wpm-e.
10:35 AM.

Exhibit A-6

[Copy]

SEMINOLE ROCK & SAND CO.

MIAMI, FLA.

MARCH 6, 1942.

Mr. J. L. BROWN,
Purchasing Agent,
Seaboard Air Line Ry., Norfolk, Va.

DEAR MR. BROWN: With reference to your wire of Mar. 4th and confirmation dated March 3rd, Order No. P-221546-C-33 covering 28,500 tons of ballast.

154 CHESTER BOWLES VS. SEMINOLE ROCK & SAND CO.

162 We are enclosing herewith a notice as exhibited in the Miami Daily News, March 3rd, which is self-explanatory and under instructions that the writer has, we cannot accept any further orders. However, the writer has taken this matter up with other members of our organization with a view of handling this particular order for you.

Due to the increase in the cost of labor and repair parts, our production costs have advanced considerably and of course it is not profitable for us to produce material at the present level of prices and for this reason we would be unable to fill the above-mentioned order at .60¢ per ton. However, we have decided if you so desire that we will run the 28,500 tons required by you, as a special run at a 0.75¢ per ton price in order to take care of this order and at this figure will of course guarantee delivery of the required tonnage per day to the best of our ability.

Please advise us by return mail if you so desire to have us handle this order at the increased price so that we may be able to make the necessary arrangements to produce same for you.

Yours very truly,

SEMINOLE ROCK & SAND CO.,
By (S) J. R. RANKIN, Sales Mgr.

[Copy]

NOTICE

Seminole Rock and Sand Co. Is Discontinuing the Production of Rock and Sand. All Orders Which We Have Accepted Will Be Finished Promptly

1. Certain materials urgently requested for National Defense prevents our securing priority orders for repair parts, appliances, supplies, and materials essential to future operations.

2. At present there appears to be an abundance of Rock and Sand available for prompt delivery in the Greater Miami Area.

3. The property owned by the Seminole Rock and Sand Co., can be used for commercial or Defense purposes requiring inland lakes, waterways, railroads, highways, and land.

4. Before removal of dredge, draglines, cranes, tractors, and other machines for excavating, transporting, and proceeding Rock and Sand, and changes, extensions, or additions desired in waterways, railways, and highways can be constructed economically and promptly.

163 It is the most earnest desire of this Corp. for its personnel, production, plant, equipment, land, railway, and highways, to be of the greatest possible value to the U. S. govern-

ment. Especially during the unlimited National Emergency proclaimed by the president.

SEMINOLE ROCK AND SAND CO.,
Red Rd. at 14th St., NW.,
P. O. Box 3430, Phone 4-3515.

Exhibit A-7

[COPY]

NORFOLK, VIRGINIA, March 9th, 1942.

P-221546-C-26

CAK 3372.

SEMINOLE ROCK AND SAND COMPANY, *Miami, Florida.*

Your let March 6th Satisfactory increase price order P-221546 covering 28,500 tons Class A rock ballast to read 75 cents per ton. Acknowledge.

J. L. BROWN. 3:00 PM.

cc. Mr. T. A. Hodges.
cc. Commodity.
whr-vah.

Exhibit A-8

[COPY]

NORFOLK, VIRGINIA, March 9th, 1942.

P-221546-C-26

SEMINOLE ROCK AND SAND COMPANY, *Miami, Florida.*

GENTLEMEN: Confirming my wire to you today, authorizing price of 75 cents per ton instead of 60 cents per ton, as shown on our order of the above number.

Will you please advise promptly what we may expect as to delivery, considering of course our wire of March 4th, requesting that deliveries begin the latter part of April or the first of May, completing at the rate of 30 cars per day.

Yours truly,

J. L. BROWN,
Purchasing Agent.

cc. Mr. T. A. Hodges.
cc. Commodity.
wmr-vah.

156 CHESTER BOWLES VS. SEMINOLE ROCK & SAND CO.

164 *Exhibit A-9*

[COPY]

SEMINOLE ROCK AND SAND CO.

MIAMI, FLA., *March 10, 1942.*

Mr. J. L. BROWN,
Purchasing Agent,
Seaboard Air Line Ry., Norfolk, Va.

DEAR Mr. BROWN: With reference to your order of March 3rd, Order No. P-221546-C-33 for 28,500 tons of ballast.

We are in receipt of your wire of March 9, 1942, in reply to our letter of March 6, 1942, giving us authority to increase the price on this ballot order from .60¢ to .75¢ per ton and we wish to advise that we accept this order on this basis and have changed the price carried on order to .75¢ per ton F. O. B. cars our plant.

We will appreciate it if you will give us as much advance notice as possible when shipments are to be made on this order in order to enable us to have the necessary material on hand so as to avoid any delays in delivery.

Thanking you for this order, we are

Yours very truly,

SEMINOLE ROCK & SAND CO.,
By (S) J. R. RANKIN, *Sales Mgr.*

Exhibit A-10

[COPY]

CAK 3372.

NORFOLK, VIRGINIA, *April 11, 1942.*

P-42910-C-33

SEMINOLE ROCK AND SAND COMPANY, *Miami, Fla.*

Enter order P-42910 for 8,000 tons Miami native rock to be shipped when called for by Division Engineer. Acknowledge. Confirmation follows.

J. L. BROWN. 9:50 AM.

cc. Mr. T. A. Hodges, Per conservation with Mr. Martin.

cc. Mr. T. R. Traphoner. Your H-38. You will please handle direct with shipper when this material required
fgf-vah.

165

Exhibit A-11

[Copy]

Reqn. Number NF-4283. Order Number P-42910-C-33.
4-15-42-P. April 17, 1942. ewl.

SEMINOLE ROCK AND SAND COMPANY, *Miami, Fla.*

Purchase Department's File Copy of Purchase Order

Confirming phone conv. with Mr. Ford to place order by
wire—

8,000 tons Spl. Miami Native Rock.

Price, \$0.60 per net ton.

F. O. B., cars SAL Rwy. tracks.

Delivery, See below.

Route, via SAL Ry.

Note—This order confirms my wire 4-11-42. For maintenance.
Do not duplicate shipment.

Delivery, When called for by DIVN ENGR.

Terms: Please advise.

J. R. Traphoner.

Order-P-42910-C-33-NF-4283.

Sec. 1, Jacksonville, Fla.

Charge: 4-13-42.

Required for Reqn. Date

App'rd by

6

Exhibit A-12

[Copy]

WESTERN UNION

MZA200-QA97 21/18 DL Miami Fla 21 931 A.

J. L. BROWN,

Purchasing Agt., Seaboard Air Line Rwy., Norfolk, Va.:

Reference our letter March 6th and your order P-42910-C-33.

Please confirm 75 cents per ton price this order.

SEMINOLE ROCK & SAND CO.

P-42910-C-33 75.

158 CHESTER BOWLES VS. SEMINOLE ROCK & SAND CO.

166

Exhibit A-13

[Copy]

CAK 3372.

NORFOLK, VA., April 21, 1942.

P-42910-C-33

SEMINOLE ROCK AND SAND COMPANY, *Miami, Florida.*

Retail ship order P-42910 at 75¢ per ton.

J. L. BROWN: 11:00 AM.

cc. Mr. T. Hodges.

cc. Commodity—Note correction in price.

FGF-RVB

Exhibit A-14

[Copy]

NORFOLK, VA., April 28, 1942.

64.1

SEMINOLE ROCK AND SAND COMPANY, *Miami, Fla.*

Understand from our Roadmaster Hancock you are in position furnish additional Miami rock ballast to our specification 304. Please advise at what price you could furnish one hundred thousand tons and at what rate shipments could be made.

J. L. BROWN.

CAK 3372.

Wpm-e.

5:00 PM.

Exhibit A-15

[Copy]

APRIL 30, 1942.

Miami, Fla. 30 925A.

J. L. BROWN, *Purchasing Agent,*

Seaboard Airline Railway Co., Norfolk, Va.:

Retel we are in position to accept additional order 100,000 tons of ballast price will be 75 cents per ton can ship 25 to 30 cars per day please advise.

SEMINOLE ROCK AND SAND CO.

100,000 75 25 30.

167

Exhibit A-16

[Copy]

NORFOLK, VA., April 30, 1942.

P-424043-C-33

CAK 3372 (S. A. L. Ry.) Day Letter.

SEMINOLE ROCK & SAND CO., Miami, Fla.:

Retel. Enter order P-424043 for one hundred thousand tons ballast 75 cents per ton fob SAL for delivery as called for by Division Engineer Jacksonville. Confirming order follows.

J. L. BROWN.

j.

11:03 AM.

Exhibit A-17

[Copy]

Reqn. number NF-42155-M. Order Number P-424043-C-33.

APRIL 30, 1942.

SEMINOLE ROCK & SAND CO., Miami, Fla.:

Purchase Department's file copy of Purchase Order. 100 000 tons Miami Native Rock (Ajus) to conform to Class "A" Spec. MW&S-304. For use ballast and dust rock North Florida Division.

Note—To be delivered as called for by Division Engineer.

Price, \$0.75 per net ton.

FOB, SAL Rwy.

Delivery, See above.

Terms, Please advise.

Route, Via SAL Rwy.

Note—This order confirms my wire April 30, 1942, requesting that you enter this order. Do not depulicate shipment.

J. R. Traphoner, D. E. As above Jacksonville, Fla.

Order P-424043-C-33 NF-42155-M.

MW&S April 21, 1943.

J. L. KIRBY.

168

Exhibit A-18

[Copy]

SEABOARD AIR LINE RAILWAY

L. R. Powell, Jr., and Henry W. Anderson, Receivers.

J. L. Brown, Purchasing Agent.

PURCHASING DEPARTMENT,

NORFOLK, VA., July 3, 1942.

3811.5

SEMINOLE ROCK & SAND CO.,

P. O. Box 3232, Miami, Fla.:

GENTLEMEN: Under the provisions of the General Maximum Price Regulations issued by the Office of Price Administration under date of April 28, 1942, we are not allowed to pay you prices which exceed the highest price for which you sold or offered to sell the same or similar commodities during March 1942.

In order to meet the requirements of these regulations we request that you acknowledge to us that the price on any orders which we have heretofore placed with you and which have been or will be shipped subsequent to May 10, 1942, did not or will not exceed the highest price for which you sold or offered to sell the same or similar commodities during March 1942.

Your very truly,

J. L. BROWN,
Purchasing Agent.

Exhibit A-19

[Copy]

Reqn. Number, CEMW 723-M. Order Number P-724015-C-33.

JULY 7, 1942.

SEMINOLE ROCK & SAND CO., *Miami, Fla.:*

V

Purchase Department's File Copy of Purchase Order

115,000 tons Miami native rock (Ojus) to conform to class A spec. MW&S 304.

Price, \$.75 per net ton.

FOB, SAL Ry.

169 Delivery, When called for by Div. Engr.
Terms, Show on invoice.

Route via SAL Ry.

Note—To be loaded in SAL hopper bottom cars.

Acknowledge receipt.

To be used on NF Div. 1943 Ballast program.

J. R. Traphoner, Div. Engr., Sec. 1.

Order: P-724015-C-33, CEMW 723-M.

Destination as called for by Div. Engr.

Charge: Auth pending July 6, 1942. J. L. Kirby. Required for

6

Exhibit A-20

[Copy]

WESTERN UNION

QA 62 MZA 424 103/98 DL RW Miami Flo 11 1214P.

J. W. BROWN,

Seaboard Air Line Rwy., Norfolk, Vir.

Re your order No. P-724015-C-33 for 115 000 tons ballast. Sorry we cannot see our way clear to accept this order unless some arrangement is made whereby all switching on our siding is done by your engines. Our present facilities inadequate and much too undependable to permit us to guarantee deliveries. Also present order with you will require approximately sixty days to complete and from information gathered locally we have no assurance that Seaboard tracks will be on their present location or ~~just~~ where they will be located sixty days hence. We regret our inability to serve you.

SEMINOLE ROCK & SAND CO.

P-724015-C-33 115,000.

Exhibit A-21

[Copy]

SEMINOLE ROCK & SAND COMPANY

MIAMI, FLA.

JULY 20, 1942.

Mr. J. L. BROWN,

Purchasing Agent,

Seaboard Air Line Railway, Norfolk, Virginia.

DEAR MR. BROWN: Referring to our wire of July 11, 1942 and to your letter of July 3rd, we beg to advise that the highest price at which we sold ballast in March 1942 was seventy-five cents (75¢) per ton.

We are now shipping you an order of one hundred thousand (100,000) tons at this price, which is about 50% complete.

In accordance with our wire, we beg to repeat that it is impossible for us to accept orders for ballast other than that already undertaken. We have been advised that certain defense construction projects in this section are going to require our rock for immediate emergency construction. This will necessitate discontinuing shipments of ballast until these orders are filled.

We fully appreciate the importance of the ballast to Seaboard Air Line Railway. It is now of great importance to supply defense projects with their requirements, which are unavailable elsewhere. We have made an intense study of these problems in the hope that we might continue ballast moving to Seaboard Air Line at the rate of twenty to twenty-five cars per day until all your requirements, except the 115,000 ton order (which we declined), for ballast were fulfilled and at the same time supply the defense projects with their requirements.

In order to do this, we would require in addition to twenty-five cars of ballast per day for Seaboard Air Line, thirty cars per day within ten days or two weeks from today and at least forty-five cars within less than thirty days from today. To accomplish this, we would be compelled to either rent or purchase a substantial amount of heavy equipment. This method of production greatly increases our unit cost. For that reason, we are unable to say at this time just what price would be necessary in order to enable us to accept your order for the additional 115,000 tons which we declined by wire on July 11th.

Please bear in mind that for many years at the request of your management, we have maintained stock piles of not less than 10,000 tons of ballast for emergencies, such as washouts, hurricanes, etc. Today, we have less than 2,000 tons of ballast on our yards.

Please be assured of our earnest desire to cooperate with you in every manner possible.

Yours very truly,

SEMINOLE ROCK AND SAND COMPANY,
R. G. LASSITER, *President*.

171.

Exhibit A-22

[Copy]

WESTERN UNION

NORFOLK, VA., *October 1, 1942.*

CaK 3372 (SAL Ry.) Day Letter.

P-724015-C-33

P-424043-C-33

SEMINOLE ROCK & SAND CO., *Miami, Fla.*

Referring conversation Sexton last week. We are in urgent need ballast and therefore authorize you enter order P-724015.

CHESTER BOWLES VS. SEMINOLE ROCK & SAND CO. 163

for 115,000 tons Miami native rock at \$1.00 net ton fob Sal tracks. You are authorized increase price order P-424043 to 85¢ net ton on ballast remaining be shipped. Acknowledge.

J. L. BROWN.

JLB-j.
9:32 AM.

Exhibit A-23

[Copy]

WESTERN UNION

NORFOLK, VA., October 3, 1942.

CAK 3372 (S. A. L Ry.).

P-724015-C-33

P-424043-C-33

SEMINOLE ROCK & SAND Co., Miami, Fla.

Please acknowledge my wire October 1st regarding ballast orders P-724015 and P-424043.

J. L. BROWN.

j.
10:45 AM.

172

Exhibit A-24

[Copy]

WESTERN UNION

MZB40 QA75 54/50 DL Miami, Flo 5 1007A.

J. L. BROWN.

Purchasing Agent,

Seaboard Rwy. Co., Norfolk, Vir.

We acknowledge receipt of your wire dated Oct. first placing order No. P-724015 for 115 thousand tons. We are making plans to resume shipment on order No. P-424043 about Oct. 15th at rate of not less than 50 cars per week with expectation of substantial increase in shipment shortly thereafter.

SEMINOLE ROCK AND SAND CO.

164 CHESTER BOWLES VS. SEMINOLE ROCK & SAND CO.

Exhibit A-27

[Copy]

10854 1

SEMINOLE ROCK & SAND CO.

P. O. Box 3232

MIAMI, FLORIDA

Customer's Order No. & Date, P-1012197-C.33. 76759. Refer to Invoice No. 1009. Car 850, FOB Checked.

Requisition No. Nov. 10/41. Invoice Date, March 16/42. Terms Approved. Price Approved. W.

Contract No. N. F. 101270.

Sold to Seaboard Air Line Railway Co., Norfolk, Va.

Shipped to and Destination Seaboard Air Line Railway Co., c/o E. M. Hutto, West Palm Beach, Fla.

Car Initials and No. Mch 15/42 as below. From Hialeah, Fla. FOB Plant.

BALLAST—MIAMI NATIVE ROCK

Quantity	Stock number		Description	Unit price (lbs.)	Amount
SAL 51.85 Tons Ballast @ .60	Car No. 36530	Gross 142,300	Tare 39,000	Net 103,300	\$30.99

NF-101270.

MW. & S.

173

Exhibit A-28

[Copy]

SEMINOLE ROCK & SAND CO.

P. O. Box 3232

MIAMI, FLORIDA

Customer's Order No. P-424043-C-33. Date, April 30, 1942. 9-2421. For Customer's Use Only. Register No. 34774.

Refer to Invoice No. 2339. SAL Ry. F. O. B. Checked. Price Approved. W.

Invoice Date, Sept. 20, 1942.

Sold to Seaboard Air Line Railway Co., Norfolk, Va.

CHESTER BOWLES VS. SEMINOLE ROCK & SAND CO. 165

(S) J. R. Traphoner. Material Received. Date, 10/9/1942.
Signature, J. R. Traphoner.

Shipped to and Destination SAL Ry Co. & W. J. Bass, Wild-
wood, Fla.

Date Shipped, Sept. 29, 1942. From Hialeah, Fla. F. O. B.
Plant.

How Shipped and Route, As Below.

Terms: Net—Positively no Discount.

Ballast Miami Native Rock

Quantity	Stock number		Description	Unit price (lbs.)	Amount
	Car No.	Gross	Tare	Net	
INT.....	2701	108,500	37,900	70,600	
SAL.....	57210	119,100	39,800	79,300	
74.95 Tons Ballast @ .75.....				149,900	\$56.21

NF-42155—M.

Exhibit A-29

[Copy]

SEMINOLE ROCK & SAND CO.

P. O. Box 3430

MIAMI, FLORIDA

Customer's Order No. P-424043-C33. Date, 4/30/42. Requi-
sition No. NF-42155-M.

Refer to Invoice No.: 2997. 533. 42211. Invoice Date, Dec.
11, 1942.

174 **FOB Checked SAL. Price Approved. W. Material**
Received 12/15/1942. J. R. Traphoner.

Contract No.

Sold to Seaboard Air Line Railway, Norfolk, Va.

Shipped to and Destination, SAL Railroad, c/o J. L. Gibbs,
Center Hill, Fla. J. R. Traphoner.

Date Shipped, Dec. 11, 1942.

How shipped and Route, Below.

166 CHESTER BOWLES VS. SEMINOLE ROCK & SAND CO.

Quantity	Stock number		Description	Unit price (lbs.)	Amount
	Car No.	Gross	Tare	Net	
L&N	185854	138,200	39,600	98,700	
L&N	184347	135,300	39,600	95,700	
L&N	62422	153,500	40,600	112,900	
N&W	73533	164,400	42,000	122,400	
CC&O.	44316	141,900	39,200	102,700	
SAL	36628	140,200	39,200	101,000	
L&N	180616	141,500	39,500	102,000	
SAL	36503	139,300		99,800	
CC&O.	44545	131,000	39,200	91,900	
CG	21063	135,100	39,500	95,600	
L&N	86863	141,800	39,900	101,900	
INT	8732	136,900	39,600	97,300	
L&N	28960	133,300	39,100	94,200	
				1,316,100	
658.05 Tons Ballast @				658.05	\$559.34

NF-42155-M.

MW S.

Sec.

Exhibit A-30

[Copy]

SEMINOLE ROCK & SAND CO.

P. O. Box 3230

MIAMI, FLORIDA

Customer's Order No. P-724015-33. Date July 7, 1942.

Requisition No. CEMW-723 M.

11156. 177409. Invoice No. 3919, May 17, 1943.

F. O. B. Checked SAL Ry. Price Approved, H. 5/19/1943.

J. R. Traphoner.

Sold to Seaboard Air Line Railway, Norfolk, Va.

Shipped to and Destination, SAL Railroad c/o D. B. Neil,

RM. Wildewood, Florida.

Date Shipped 5/15/43. From Plant. J. R. Traphoner.

How shipped and Route, SAL.

Terms, Net Positively No Discount.

Quantity	Stock number		Description	Unit price (lbs.)	Amount
	Car No.	Gross	Tare	Net	
SAL	26294	132700	39100	93600	
SAL	36533	138100	38300	99800	
INT	6757	142200	40300	101900	
INT	6462	139500	38800	100700	
CRR	47523	148000	41900	106100	
				502100	
21.05 Tons Ballast @ \$1.00					\$251.05

CEMW-723-M

Sec. 1

Net.

Exhibit A-31

[Copy]

AUGUST 28, 1941.

Subject: St. Lucie Canal Dam, Indiantown, Fla.

P. V. LOFTIS-CONTRACTING Co., *Charlotte, N. C.*

GENTLEMEN: We have a letter under date of Aug. 23rd from the office of the Southern Aggregates Corporation, Raleigh, N. C., to the effect that you had been awarded the contract for the St. Lucie Canal Dam and that your Mr. Chas. A. Green would be in Indiantown Tuesday the 26th. The writer went to Indiantown Tuesday and endeavored to locate Mr. Green but could not find that he had been there. The writer also returned to Indiantown Wednesday in order to contact Mr. Green but was unsuccessful in locating him, therefore we are writing you direct relative to the aggregate required for this project.

Although we have not seen the specification covering the aggregate on this specific job, we understand it is under the supervision of the U. S. Engineers' Office, Jacksonville, and is probably under Federal Specification SS-A-281, therefore if the material required is under this specification or a similar Federal Specification, we wish to quote you the following prices:

Crushed Concrete Rock-----	.50 per ton
Screenings—Sand-----	.70 per ton

The above prices are F. O. B. our plant, Miami, Fla., and we are advised by the Seaboard Railway that the freight rate to Indiantown is \$1.00 per ton.

If this material must move via barge, if you will so advise, we will endeavor to line up a towing concern to handle it.

176 Although the barge situation is very unsatisfactory at the present time, due to increased water movement on defense work, we may be able to work out some deal with a local towing concern.

The writer would very much like to contact Mr. Green and if he is in this territory, we would appreciate a wire from you advising where we can contact him.

Trusting the above prices will be interesting to you and trusting to hear from you by early mail, we are

Yours very truly,

SEMINOLE ROCK & SAND CO.,

By J. R. RANKIN, *Sales Mgr.*

cc. Mr. Chas. H. Barnett, Raleigh, N. C.

Exhibit A-32

[Copy]

SEPTEMBER 22, 1941.

Re: Aggregate for St. Lucie Lock & Dam

V. P. LOFTIS COMPANY,
General Contractors,

St. Lucie Canal, Lock & Dam, Stuart, Florida.

GENTLEMEN: Due to the fact that the specifications covering the concrete aggregate is so rigid and from what information we have been able to gather on the present project, together with information we have on previous jobs of a like nature constructed in the St. Lucie Canal, we do not feel that it would be of any use to submit samples of our material to Jacksonville for testing. It is our understanding that inspection on previous work at St. Lucie has been very rigid due to the nature of the construction and with this in view we would not want to agree to furnish you material under the present specifications.

The specific gravity as you know is 2.45, whereas our material will run from 2.31 to 2.36, while the sand specification calls for 10-25 passing #50 screen, while our sand will run from 30-35 passing #50 screen. We do appreciate the opportunity you have given us to furnish the aggregate for your contract and we are very sorry that our material falls so short of the requirements, but if there is anything we can do to help you locate required aggregate we are at your service and will do all we can to assist you.

It is possible that the sand produced at West Palm Beach by Burnup & Sims might meet the specifications. You are at liberty to call on us for any information or assistance or anything that you are of the opinion we can help you on.

Thanking you again for your kind courtesy when the writer called on you and with best personal regards to Mr. Deenis and Mr. Green, we are

Yours very truly,

SEMINOLE ROCK & SAND CO.,
By J. R. RANKIN, Sales Mgr.

Exhibit A-32-1

[Copy]

V. P. LOFTIS CO.—ENGINEERS & CONTRACTORS

Builders Building

CHARLOTTE, N. C.

District Testing Laboratory—Form 10 Rev.

AGGREGATE ANALYSIS REPORT

Sample submitted by Seminole Rock & Sand Co. Lab No. A-58.

Aggregate to be used at St. Lucie Lock & Dam, Stuart, Fla.

(location of job)

To be used for Class "B" concrete—construction of spillway.

(type of concrete or bituminous mix—phase of work ex: aprons)

Date submitted, Jan. 12, 1942. Date of report, Jan. 15, 1942.

Source of coarse aggregate, Seminole Rock & Sand Co., Miami, Fla.

(location of pit—mfg.)

Source of fine aggregate, none.

COARSE AGGREGATE—COMBINE SIZE 2" TO 1"

Sieve No.	Weight retained	Per cent retained	Percent passing	Accum. % passing	Spec. accum. % passing	Remarks
2"	0.00	0.00		100.0		
1 1/2"	0.34	0.08		99.2		Unit WT. per cu. ft.
1"	13.37	29.8		69.4		Lbs.
3/4"	30.91	68.8		0.6		Dry loose 73.03.
3/8"						Dry redded 84.06.
2"						
1 1/2"						
1"						
3/4"						
3/8"						
Pan	0.30	0.6		0.0		
Totals	44.92	100.0				

Soft Fragments, Weight ----- % Excessive amount of friable and unsound particles.

178 Clay lumps, Weight ----- % None

Rem. by Decantation, Weight ----- %

Other Deleterious Materials -----

present in excess

Sodium Sulphate Test -----

Abrasion Test: Type ----- Result -----

Specific Gravity, 2.46. Absorption, 2.38%.

Opinion of Lab. Engineer: Close visual examination shows that this material, as Represented by the above sample, appears unsound for use as coarse aggregate in concrete—especially where the concrete will be exposed to aggressive waters.

Exhibit A-33

[Copy]

U. S. Engineer Dept., Jacksonville, Fla.
District Testing Laboratory—Form 10 Rev.

AGGREGATE ANALYSIS REPORT

Sample Submitted by _____ Lab. No. A-47
Aggregate to be Used at St. Lucie Lock & Dam, Stuart, Florida.

(Location of Job)

To be Used for Coarse aggregate in concrete—Construction of
spillway. (type of concrete or bituminous mix—phase of work—ex: aprons)

Date Submitted Dec. 17, 1941. Date of Report Dec. 29, 1941.

Source of Coarse Aggregate, Seminole Rock & Sand Co., Miami,
Fla. (Location of pit—mfrg.)

Source of Fine Aggregate, None.

COARSE AGGREGATE—MAX. SIZE 1"

Sieve No.	Weight retained	Percent retained	Percent passing	Accum. % passing	Spec. accum. % passing	Remarks
2"	0.00					Mix design for Class "A" concrete is being prepared; test cylinders for compressive strength will be made and reports submitted by the District Testing Laboratory.
1 1/2"	0.00					
1"	0.00	0.00		100.0	97-100	
3/4"	9.02	14.7		81.3		
3/8"	16.68	34.6		46.7	40-70	
2"	8.94	18.5		28.2		
1"	13.01	27.0		1.2	0-6	
Pan	0.56	1.2		0.0		
Totals	48.21	100.0				

Soft Fragments, Weight ----- % Negligible.

Clay Lumps, Weight ----- % None.

179 Rem. by Decantation Weight ----- %

Other Deleterious Materials -----

(Not present in excess)

Sodium Sulphate Test -----

Abrasion Test: Type ----- Result -----

Specific Gravity 2.56. Absorption 2.86.

Opinion of Lab. Engineer: This material, as represented by the above sample, meets the specifications for use as coarse aggregate in Class "A" concrete for St. Lucie Lock & Dam.

Exhibit A-34

[Copy]

U. S. Engineer Dept., Jacksonville, Fla.
District Testing Laboratory—Form 10 Rev.

AGGREGATE ANALYSIS REPORT

Sample Submitted by Seminole Rock & Sand Co. Lab. No. A 49.

Aggregate to Be Used at St. Lucie Lock & Dam, Stuart, Fla.
(Location of job)

To Be Used for Coarse aggregate in concrete—Construction of Dam
(type of concrete or bituminous mix—phase of work—ex: aprons)

Date Submitted, Dec. 23, 1941. Date of Report, Dec. 30, 1941.

Source of Coarse Aggregate, Seminole Rock & Sand Co., Miami, Fla.
(Location of pit—mfrg.)

Source of Fine Aggregate, None.

COARSE AGGREGATE—MAX. SIZE 2"

Sieve No.	Weight retained	Percent retained	Percent passing	Accum. % passing	Spec. accum. % passing	Remarks
2"	0.00	0.0		100.0	97-100	If requested, a mix design will be submitted for Class "B" concrete and test cylinders made by the District Testing Laboratory.
1½"	0.73	1.0		99.0		
1"	17.55	23.4		75.6	40-70	
¾"	35.46	47.4		28.2		
½"	16.86	22.5		8.7		
¾"	3.80	5.1		0.6		
#1	0.21	0.3		0.3	0-6	
Pan	0.27	0.3		0.0		
Totals	74.88	100.0				

180 Soft Fragments, Weight ----- % Negligible.

Clay Lumps, Weight ----- % None.

Rem. by Decantation, Weight ----- % -----
(Not present in excess)

Other Deleterious Materials -----

Sodium Sulphate Test -----

Abrasion Test: Type ----- Result -----

Specific Gravity 2.53. Absorption 3.1. % -----

Opinion of Lab. Engineer: This material is not separated in accordance with Par. 7-07 (e) (2), of the specifications for max. size 2" aggregate, and the amount passing the 1" sieve is in excess of specified.

Exhibit A-35

[Copy]

Report A-47 pertains to the 1-inch maximum size stone submitted by the Seminole Rock and Sand Company and proposed for use as coarse aggregate in Class "A" concrete. This sample of rock as submitted conforms to the specifications as to gradation and otherwise. The use of class "A" coarse aggregate from this source is approved.

Report A-49 pertains to the sample of rock submitted by the Seminole Rock & Sand Company and proposed for use as coarse aggregate in Class "B" concrete. It will be noted that the physical properties of this rock apparently are satisfactory, but the gradation does not conform to your contract specifications. These specifications, see paragraph 7-07 (c) (2), require the separation of the coarse aggregate when the maximum size is greater than 1-inch. The gradation of the sample of rock submitted is not satisfactory but it is thought that possibly the producer of this rock can adjust the screens so as to furnish the specified gradation. A sample of the maximum 2-inch size aggregate should be submitted for test prior to the procurement of coarse aggregate of this size.

For the Division Engineer:

Very truly yours

J. R. PEYTON,
Principal Engineer.

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Exhibit A-36

[Copy]

V. P. LOFTIS Co.—ENGINEERS & CONTRACTORS

Builders Building

CHARLOTTE, N. C.

P. O. Box 952,
Stuart, Fla., February 19, 1942.

SEMINOLE SAND & ROCK COMPANY, Miami, Florida.

GENTLEMEN: We are in receipt of your letter of February 18. Previously we sent to you copies of the laboratory analysis of both class "A" and class "B" aggregate submitted to the District Testing Laboratory by you. In a letter received from the District Engineer, approving this material, the following statement was made:

"From an investigation of the source of these aggregates, it is found that the Seminole Rock & Sand Company can produce an aggregate which will meet the contract specifications and that they can also produce an aggregate which fails to meet the specifications. For this reason, it is imperative that the Seminole Rock & Sand Company exercise the greatest care in selecting aggregate for the St. Lucie Dam to be sure that the specifications are met. All aggregate secured from this company will be subject to rigid tests to insure compliance with the specifications."

In view of the above we suggest that extreme caution be taken in selecting this aggregate and inspector be on-hand when in doubt. This inspector can be obtained by notifying us by phone, wire or letter.

Yours very truly,

V. P. LOFTIS COMPANY.
By C. H. COMBS.,
C. H. Combs.

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Exhibit A-37

[Copy]

V. P. LOFTIS COMPANY

Contractors & Engineers

CHARLOTTE, NORTH CAROLINA

STUART, FLORIDA,

P. O. Box 952;

June 17, 1942.

Re: St. Lucie Lock & Dam

SEMINOLE ROCK & SAND COMPANY, *Miami, Florida.*

GENTLEMEN: Acknowledging your letter of June 15th, your interpretation of the specifications is correct for the class A concrete and is as stated in your letter with a gradation from $\frac{1}{4}$ " to 1"

Passing

1"	-----	97-100%
$\frac{1}{2}$ "	-----	4-70%
$\frac{1}{4}$ "	-----	0-6%

The maximum size for class "B" concrete to be 2" with the following gradations specification.

Screen 2"	-----	97-100%
Screen $1\frac{1}{2}$ "	-----	40-70%
Screen 1"	-----	0-6%

Please note that you are to make 2 separate stock piles: one for the gradation of $\frac{1}{4}$ " to 1", and one for the gradation of 1" to 2". The combining of the class "A" stone with the class "B" stone to make class "B" concrete will be made at the job.

174 CHESTER BOWLES VS. SEMINOLE ROCK & SAND CO.

We have yet to pour approximately 6,000 yards of class "B" concrete, the stone to be shipped as follows: 2,500 yards on the job by July 15th and 2,500 yards a month until complete. We have yet to pour approximately 600 yards of class "A" concrete. This entire quantity can be shipped about August 1st, 1942.

Trusting the above is the desired information, if not please advise us at once.

Yours very truly,

V. P. LOFTIS COMPANY.
By J. C. KELLOG.

I certify that this is a true copy as shown by our records.
(Signed) W. B. CLARK.

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Exhibit A-38

[Copy]

SEMINOLE ROCK & SAND CO.—TABULATION OF ORDER COMMITMENTS AS OF MARCH 11, 1942

Project	Specification rock		Regular rock			Sand	Shipping schedule
	Con. R.	Cover R.	Ballast	Con. R.	Pea R.		
Pan American Airport				3,500	3,500	2,500	3/11-5/11.
Master Airport				2,500	2,500	2,000	3/11-4/11.
Arcadia				500			3/11-4/11.
Sebring		1,200					3/25-4/11.
Clewiston				500		400	3/11-5/11.
Biscayne Causeway				500			3/11-5/11.
Key West				15,000		12,000	3/11-6/30 1500.
Tampa				500			3/11-5/11.
Belcher, Trail Job		5,300					3/18-5/18.
St. Lucie Dam	6,500						5/1/42 continuing
S. A. L. Ballast			31,500				5/1-5/31.
	6,500	6,500	31,500	23,000	6,000	16,900	

INVENTORY MAR. 11, 1942

	Total	90,400
		CY
Ballast		18,344
Regular Con. R.		3,195
Regular Pea R.		7,645
Belcher Cov. R.		1,000
Sand		3,808
St. Luc. Sp. R.		900
		34,892

Exhibit A-39

SEMINOLE ROCK & SAND CO.—TABULATION OF ORDER COMMITMENTS AS OF MARCH 24, 1942

Project	Specification rock		Regular rock			Sand	Shipping schedule
	Con. Rock	Cover Rock	Ballast	Con. R.	Pea R.		
Pan American Airport				3,000	3,500	2,000	Now shipping.
Master Airport				1,500	2,000	1,000	Do.
Arcadia				500			Do.
Sebring		1,200					4/1/42.
Clewiston				500		400	Now shipping.
Biscayne Causeway				500			4/1/42.
Key West				13,000		10,500	Now shipping.
Tampa				500			Do.
Belcher Trail Job		5,300					Do.
St. Lucie Dam	6,500						5/1/42.
Sal Ballast			31,500				5/1/42.
	6,500	6,500	31,500	19,500	5,500	13,900	

Total..... 83,400 c. y.

INVENTORY MAR. 24, 1942

Ballast	CY
Reg. Con. r.	13,965
Pea r.	1,094
Belcher r.	7,061
St. Lucie r.	1,800
Sand	900
	2,196
	27,016

184 EXHIBIT "A" OF PLAINTIFF AS DESCRIBED IN STIPULATION OF COUNSEL SIGNED MARCH 17, 1944, RELATING TO ADMISSION IN EVIDENCE OF CERTAIN DOCUMENTARY PROOF

Photostatic copies of this exhibit have been filed with the Court; see stipulation in re-printing, R. 200.

185 *Plaintiff's Exhibit "B" on Final Hearing*

[Copy]

THE H. C. NUTTING CO.

Engineers and Chemists, 4120 Davis Lane

CINCINNATI, OHIO

Lab. No. 5127. Miami Office Blue No. 187. Report No. 5.
Order No. M-1425.

MARCH 3, 1942.

REPORT OF TESTS

Gradation Test of Ballast Rock

Client: Seminole Rock & Sand Company, Miami, Florida.

Sample: Ballast Rock.

Submitted: By your Representative on February 26, 1942.

Reported to: Seminole Rock & Sand Company, Miami, Florida.

RESULTS OF TESTS:—GRADATION—BALLAST ROCK

Passing 3" Sieve.....	100.8%
Passing 2" Sieve.....	56.5%
Passing 1½" Sieve.....	61.8%
Passing 1" Sieve.....	17.5%
Passing ¾" Sieve.....	1.3%

Respectfully submitted.

THE H. C. NUTTING COMPANY,
F. E. MILLER, Branch Manager.

CC: None.

Plaintiff's Exhibit "C" on Final Hearing

[Copy]

THE H. C. NUTTING CO.

Engineers and Chemists, 4120 Davis Lane

CINCINNATI, OHIO

Lab. No. 1859. Miami Office Blue No. 2412-VB 9/25/43. Order No. 1425.

REPORT OF TESTS

Tests on Railroad Ballast.

Client: Seminole Rock and Sand Company, Miami, Fla.

Sample: Railroad Ballast.

186 Submitted: By Mr. Plath of the Seminole Rock and Sand Co. on September 23, 1943.

Reported to: Seminole Rock and Sand Co., Miami, Fla.

RESULTS OF TESTS

Laboratory Number.....	1859
Gradation:	
Passing 3" Sieve.....	93.2%
Passing 2" Sieve.....	58.5%
Passing 1½" Sieve.....	21.7%
Passing 1" Sieve.....	5.4%
Percent Wear (Duval Abrasion Grade A).....	9.4%
Bulk Specific Gravity.....	2.437

The above tests were made in accordance with methods prescribed by the American Society for Testing Materials.

Weight 79± to cubic ft., phoned in by Seminole Rock.

Respectfully submitted.

THE H. C. NUTTING COMPANY,
(S) GEO. E. WINGBETTER.

Defendant's Exhibit 1 on Final Hearing

V. P. LOFTIS COMPANY

General Contractors, Builders Building

CHARLOTTE, NORTH CAROLINA

SEPTEMBER 10, 1941.

DEF. #1. DEF. 1 ID.

Subject: St. Lucie Canal, Lock, and Dam

SEMINOLE ROCK & SAND COMPANY,

P. O. Box 3430, Miami, Florida.

Miami, Florida.

Att.: Mr. J. R. Rankin.

DEAR SIR: Enclosed please find Two sheets from specifications governing this job. It will give you the desired information as to specific requirements of fine and coarse aggregates.

Please furnish us with One Hundred Pound samples of sand and rock of the various screenings, labeled in such a way that they can be identified, addressed to: V. P. Loftis, General Contractors, St. Lucie Canal, Lock, and Dam, Stuart, Florida.

Under separate cover, please furnish me with your quotations on sand and rock, F. O. B. Barge, Job Sight.

187 If possible, furnish me with what information you can as to delivery facilities, quantities on each delivery, time required for delivery upon notice to ship.

I am endeavoring to get clear in my mind a definite set-up for sand and rock, that I may organize an efficient operating plant.

I would appreciate your calling on me at your earliest convenience and please give the matter your personal attention in seeing these Two Sheets returned to me as soon as they are available. Thanking you in advance, I remain,

Yours truly,

(S) CHAS. A. GREEN.

(S) C. A. GREEN.

CAG:EG.

ENC.

7-06. FINE AGGREGATE.—

(a) **Composition.**—Fine aggregate shall consist of natural sand, or, subject to the approval of the contracting officer, prepared stone sand, or prepared blast-furnace slag sand.

(b) **Quality.**—Fine aggregate shall consist of hard, strong, durable, and uncoated particles.

(c) **Grading.**—

(1) Except as provided in (2) below, fine aggregate shall be well and properly graded from fine to coarse, and the grading shall be consistent within the following limits, as approved by the contracting officer:

Standard square mesh:	Percent by weight
Passing No. 4 sieve.....	95-100
Passing No. 16 sieve.....	35- 85
Passing No. 50 sieve.....	10- 25
Passing No. 100 sieve.....	1.5 to 7

(2) Deficiencies in the percentages of fine aggregate passing the #50 and #100 sieves, as required in the above gradation, may be remedied by the addition of puzzolanic, silicious, or cementitious materials, excepting Portland Cement; provided, at least 5% passes the #50 sieve, and the aggregate is of proper consistent gradation within the specified limits. Such added material, which will be considered and included as fine aggregate, shall conform to the requirements in paragraphs 7-08, and shall be in sufficient quantity to meet the minimum requirements above for percentage passing the #100 sieve, and otherwise to produce the workability required by the contracting officer. The quantity

and characteristics of any material used for the purpose of correcting workability shall be such that when the concrete is gaged to the proper consistency the total water content shall not exceed by more than 1 gallon per cubic yard the minimum quantity required for proper consistency when not using the admixture. The blending of any material with the original naturally graded sand to remedy deficiency in gradation shall be accomplished in charging the mixer, unless otherwise specifically authorized by the contracting officer.

(d) **Deleterious Substances.**—The substances designated shall not be present in excess of the following amounts:

	Percent by weight
Clay lumps.....	1
Material removed by decantation from aggregates.....	3

(e) **Mortar Strength.**—Mortar specimens made with the fine aggregate shall have a compressive strength at 28 days of at least 90% of the strength of similar specimens made with Ottawa sand having a fineness modulus of 2.40 ± 0.10 .

(f) Tests.—Fine aggregate shall be subjected to careful, thorough analyses to determine conformity with all requirements of these specifications.

7-07. COARSE AGGREGATE.—

(a) Composition.—Coarse aggregate shall be washed gravel or crushed stone, having an "Apparent" specific gravity of not less than 2.45.

(b) Quality.—Coarse aggregate shall consist of hard, tough, and durable particles free from adherent coating. It shall contain no vegetable matter, nor soft, friable, thin, or elongated particles in quantities considered deleterious by the contracting officer. The substances designated shall not be present in excess of the following amounts:

	Percent by weight
Soft fragments.....	5
Clay lumps.....	$\frac{3}{4}$
Removed by decantation.....	1

When the material removed by decantation consists essentially of crusher dirt, the maximum amount permitted may be raised to $1\frac{1}{2}$ percent. Aggregate which has disintegrated or weathered badly under exposure conditions similar to those which will be encountered by the work under consideration shall not be used. When crushed stone is used, the crusher shall be equipped with a screening system which will entirely separate the dust from the stone and convey it to a separate bin.

(c) Size.—

(1) Coarse aggregate shall be well-graded from fine to coarse so that concrete of the required workability, density, and strength can be made without the use of an excess amount of sand, water, or cement.

For Class "A" concrete, the maximum size mesh screen for the aggregate shall be not less than $\frac{3}{4}$ inch, nor more than 1 inch, except that Class "A" concrete used for embedment of multiple banks of fibre conduit ducts shall be made with $\frac{1}{2}$ inch maximum sized coarse aggregate.

For Class "B" concrete, the maximum size mesh screen for the aggregate shall be not less than $1\frac{1}{2}$ inches nor more than 6 inches.

(2) When the maximum size mesh screen is greater than 1 inch, the aggregate shall be separated, and the specified sizes delivered separately to individual proportioning hoppers, in accordance with the following:

For Maximum Size Mesh Screen, 1 in. to 2 in. inclusive: (1) No. 4 sieve (square mesh) to $\frac{1}{2}$ maximum size mesh screen, inclusive. (2) Over $\frac{1}{2}$ maximum size to and including full maximum size mesh screen.

For Maximum Size Mesh Screen Greater than 2 in.—(1) No. 4 sieve (square mesh) to 1" maximum size mesh screen, inclusive. (2) Over 1" maximum size to and including $\frac{1}{2}$ maximum size mesh screen. (3) Over $\frac{1}{2}$ maximum size to and including full maximum size mesh screen.

Within any of the above-indicated size limits, not less than 85 percent of the material shall be retained on a standard square mesh screen of the minimum size indicated and not more than 5% shall be retained on a standard square mesh screen of the maximum size indicated.

(3) The grading of the coarse aggregate, in the mixed concrete, shall fall within the following limits:

Standard Square Mesh:

	Percent by weight
Passing maximum size mesh screen	97-100
Passing $\frac{1}{2}$ maximum size mesh screen	40-70
Passing No. 4 sieve ($\frac{1}{4}$ inch)	0-5

(d) Tests.—Coarse aggregate shall be subjected to freezing and thawing tests and to careful, thorough analyses to determine conformity with all requirements of these specifications. Where the concrete in the finished work will be exposed to contact with aggressive soils or waters, or other destructive agents, the coarse aggregate shall be subjected to the sodium-sulphate accelerated soundness test. However, aggregate failing to pass this test may be used with the approval of the contracting officer, provided it has given satisfactory service for a period of not less than 5 years under exposure conditions similar to those to which it will be subjected in the proposed work.

190 7-08. MATERIAL ADDED FOR WORKABILITY.—

(a) The use of any material added to the mix to improve workability (see paragraph 7-06 (c) (2)), which, in the opinion of the contracting officer, may have an injurious effect on the strength, density, and durability of the concrete, will not be permitted. Before approval of any material, the contractor will be required to submit the results of complete chemical and sieve analyses made by an acceptable testing laboratory. Subsequent tests will be made of samples taken by the contracting officer from the supply of the material being used on the work to determine whether it is uniform in quality with that approved.

(b) The material added shall be puzzolanic, cementitious, or silicious. It shall not contain effective early heat-producing elements nor compounds, such as those contained in Portland Cement, nor shall its use result in a material increase in the free-lime content of the concrete. It shall also be in conformity with the following requirements:

Free moisture—a total of not more than 3% by weight.

Passing #30 sieve—not less than 100% by weight.

Passing #200 sieve—not less than 85% by weight.

7-09. WATER.—The water used in mixing concrete shall be fresh, clean, and free from injurious amounts of oil, acid, alkali, or organic matter.

7-10. STORAGE.—

(a) Cement.—Immediately upon receipt, at the site of the work, cement shall be stored in a thoroughly dry, weathertight, and properly ventilated building or barge with adequate provisions for the prevention of the absorption of moisture. Storage shall be such as to permit easy access for inspection and definite identification of each shipment. Cement that has acquired warehouse or storage set shall be excluded from the concrete work. No lump-screening will be permitted.

(b) Aggregates.—The fine and coarse aggregates shall be stored separately and in such manner as to avoid the inclusion of any foreign material in the concrete. Stock piles of coarse aggregates shall be built in horizontal layers to avoid segregation:

On May 6, 1944 Transcript of decision of District Judge Alexander Akerman at conclusion of Final Hearing at Orlando, Florida, March 28, 1944, was filed in words and figures as follows, to wit:

Remarks of the Hon. Alexander Akerman, District Judge, in the decision of the above-entitled cause at Orlando, Florida, on March 28, 1944.

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In United States District Court

Decision

Filed May 6, 1944

The Court. In this case the OPA Administrator filed a complaint against the defendant in two counts, each count alleging a violation of the ceiling prices on crushed rock: the first count praying for an injunction and the second count praying for treble damages aggregating some \$130,000.00. The suit was filed (if the Court is correct in its recollection) in October 1943. The defendant filed certain affirmative defenses in the nature of a cross bill, praying an injunction against the Administrator. As far as the Court is advised, there had been nothing done on the part of the plaintiff to bring the case to a conclusion until in February, when this particular Judge was in Miami, the defendant's counsel set the case down for a hearing on his answer in the nature of a cross bill and on his motion to dismiss, at which time the Court heard testimony and arguments and came to the conclusion that the ends of justice would be best subserved by not

ruling on any of the preliminary matters at that time, setting the case down for final hearing, and such is the hearing now before the Court. The Court has now heard all of the testimony and the arguments of counsel.

If it were necessary to pass upon the constitutional questions raised in the answer, the Court would be compelled to take the case under advisement until I compared the decision rendered by the Supreme Court on yesterday with the point in this case. If this decision had not been rendered the Court would not have been compelled to pass upon the constitutional question, because a Court will never declare an act of Congress unconstitutional in a case that can be determined without such declaration.

We will first take up the second count, considering the two counts in inverse order. The Court is of the opinion that no cause of action has accrued to the Administrator for this excessive charge, assuming that it was excessive. As I construe the statute, the statute was aimed to give the ultimate consumer an action for three-fold damages. It makes no difference whether that ultimate consumer is the housewife purchasing a can of soup or the railroad purchasing a hundred thousand dollar Diesel engine. The object was two-fold. First, if the merchant or middleman in purchasing from the jobber or manufacturer was particeps criminis to the excessive charge, he could pass it down and would have been able to pass it down to the ultimate consumer, therefore, it would have been iniquitous to give him the right to recover three-fold damages when he was as deep in the mud as the manufacturer in the mire; but the ultimate consumer had no place to

pass it on and no temptation to pass it on, and therefore the 192 ultimate consumer is who they mean "in the course of trade or business." They could have used more understandable language, but I construe it to mean "ultimate consumer." In addition to that, for reasons which will be stated when I come to consider the first count, the second count will have to be dismissed on both grounds.

Now we come to the first count, which brings up some very troublesome questions. The Court is not infallible (and I may be entirely wrong), but I will have to decide them according to the facts before me. If I am wrong, I can be easily corrected. As I understand the testimony, certain things are beyond dispute. If I am incorrect in this statement, I will be glad to have my attention called to it. In March 1942 the defendant company was engaged, among other things, in filling orders of the Seaboard for ballast under a previous contract which provided that the price was 60¢ a ton, and during the month of March 1942 it did ship to the Seaboard a considerable quantity of ballast rock at the price of 60¢ a ton in accordance with the previous contract.

It is also without dispute that sometime in January (if I am correct in the month) the defendant accepted an order for crushed stone from the government contractor engaged in building what is known as the St. Lucie dam, to be delivered as called for at \$1.50 per ton, of two different grades and of two different specifications. It is also beyond dispute that by reason of the contractor not being ready for the stone, the shipment, which could have been demanded in March, was delayed, and this continued until sometime in August, I believe. There is also no dispute that later on the defendant company made a new contract with the Seaboard and made shipments at 85¢ a ton, and then later shipments under another order or contract at \$1.00 a ton. As to these facts just stated, I do not think there is any dispute. If I am wrong in my statement of these facts, I will stand corrected.

The defendant contends that one of the commodities contracted for with the government contractor was identical or substantially identical with the ballast, and the government contends that it was an entirely different commodity. The government further contends that inasmuch as none of the shipments were made under the contract, that it had no bearing on the ceiling price. Let me digress here just a moment to state that I strongly suspect that \$1.50 price was the result of one of these cost-plus contracts.

I am of the opinion that, if during the month of March the defendant company had a contract subject to delivery upon
 193 demand for the same commodity at \$1.50 a ton, that the \$1.50 would be the ceiling price, although no deliveries were made during the month, and I am also of the opinion that a fair preponderance of the testimony shows that the commodity contracted to be sold to the government contractor and the commodity sold to the Seaboard were substantially the same, and therefore I am of the opinion that the ceiling price during the month of March was \$1.50 a ton. If I am correct in this, the injunction of course must be denied and there would be an additional ground for dismissing the second count, but we can go further.

The Supreme Court since this hearing began in February has ruled that it is not mandatory upon the Court to grant an injunction, holding that it is within the sound discretion of the Court. I have never known just what "sound discretion" means. I think it means just what the appellate courts have said it ought to mean, and I think the Court in the exercise of that sound discretion can take judicial notice of general conditions and of the object of this legislation. These general conditions are particularly brought home to this individual Judge. For 13 long years the Judges of the District Court for the Eastern District of Virginia and this particular Judge have, with the aid of competent receivers, struggled to keep this particular Seaboard Air Line Railway in good

condition in order that it could discharge its public function and as far as possible to protect the investors in the securities of the railroad. In that we have been aided by the security holders with holding their demand for the payment of their bonds and interest, and we have tried to keep the entire System in a good state of repair, and in fact put on some betterments. I believe that it is now estimated that the betterments put in on the entire System were in excess of some fifty million dollars. The Judges and the Receivers can claim no credit for their foresight, but the time, care, and thought spent in keeping the road in operating condition worked out to be a wonderful lifesaver when the war came on. The Railroad assumed its part of the war railroad work, which it would not have been in a position to undertake if it had not been in a proper state of repair and improvement.

In addition to that, the Court can take judicial cognizance of the fact that on account of the excess strain on all of the railroads of the country, they are now rapidly deteriorating and in a little while the transportation situation will break down to the detriment

of the war interests of the country, and this railroad must have ballast and, according to the testimony, this is practically the only place from which certain parts of this

194 railroad can get ballast. Whether in war or not in war, we cannot make this defendant go ahead and furnish rock to the Seaboard for ballast at a loss. The undisputed evidence, as I understand it, is that 60c under the present prices would result in an absolute loss and the company could not go on with deliveries of this ballast, therefore, in the opinion of the Court it is to the public interest, to the interest of the country at large and to the interest of the war effort, for the Court in the exercise of its sound discretion to deny the injunction, and for the reasons stated the complaint on both counts will be dismissed and judgment entered for the defendant. It is not necessary to render any judgment on the cross bill or the answer in the nature of a cross bill.

I request counsel to prepare findings of fact and conclusions of law in accordance with the remarks just made.

In United States District Court

Findings of fact

Filed April 7, 1944

From a preponderance of the evidence adduced by the respective parties in this cause, the Court finds as facts, the following:

1. In March 1942 the defendant company was engaged, among other things, in filling orders of Seaboard Air Line Railway for

ballast under a contract previously entered into which provided for a price of 60¢ a ton.

2. During the month of March 1942 the defendant shipped to the Seaboard Air Line Railway a quantity of ballast rock at the price of 60¢ a ton in accordance with the contract previously entered into; that the highest price defendant charged Seaboard Railway for deliveries of ballast rock made by it during March 1942 was 60¢ per ton.

3. Between October 16, 1942 and December 16, 1942, defendant sold and delivered 25,239.25 tons of ballast rock to the railway at a price of 85¢ per ton, and that between December 11, 1942, and May 28, 1943, defendant sold and delivered 92,316.15 tons of ballast rock to the railway at a price of \$1.00 per ton.

4. Sometime in January 1942 the defendant accepted an order for crushed stone, of two different grades and two different specifications, from the government contractor engaged in building what is known as the "St. Lucie Dam" to be delivered as called for at \$1.50 per ton.

5. By reason of the contractor not being ready for the stone the shipments which could have been demanded in March 1942 were delayed and this continued until sometime in August 1942.

6. During March 1942, the defendant made a new contract with the Seaboard for ballast at a price of 75¢ per ton and subsequent to March 1942 made shipments and deliveries at such increased price; subsequently shipments and deliveries of the product were made at 85¢ per ton.

7. Still later, the defendant made further shipments of ballast rock to the Seaboard under another order or contract at \$1.00 a ton.

8. That the crushed stone contracted to be sold to the government contractor, as above stated, and that sold to the Seaboard as ballast, at the times alleged in the Complaint, were substantially the same.

9. That the ballast rock sold and delivered to the Seaboard was for use by it in its main-line railroad and not for resale.

10. That ballast rock for the Seaboard Air Line Railway is an absolute necessity and practically the only place from which certain parts of this railroad can get ballast rock in this area is from the defendant's quarries.

11. The defendant cannot sell ballast rock to the railroad at 60¢ a ton under present prices without resulting in an absolute loss and it could not go on with deliveries of ballast rock at this price.

12. It is in the public interest that shipments of ballast to the railroad must be continued.

Conclusions of law

Based upon the foregoing findings of fact, the Court announces the following conclusions of law:

(a) The government contractor who purchased crushed stone from the defendant under a contract made in January 1942 had the right to have deliveries made thereunder during March 1942.

(b) The failure to effect deliveries of the crushed stone to the government contractor during the month of March 1942 was not the fault of the defendant.

(c) The contract of January 1942 to sell crushed stone at \$1.50 a ton to the government contractor engaged in building the St. Lucie Dam which contemplated deliveries under it in March 1942 of substantially the same commodity, alleged in the Complaint to have been sold to the Seaboard Air Line Railway, was established, as of March 1942, a ceiling price under the Emergency Price Control Act and Maximum Price Regulation No. 188 of \$1.50 a ton for the ballast that subsequently was sold and delivered to the Seaboard Air Line Railway.

(d) That in the exercise of its sound discretion the Court should deny the application of the Price Administrator for an injunction restraining the sale by the defendant of ballast such as described in the Complaint for \$1.00 a ton.

(e) That the Seaboard Air Line Railway was the ultimate consumer of the ballast sold to it as alleged in the Complaint and therefore it, if anyone, had the right of action against the defendant under Section 205 (e) of the Emergency Price Control Act and no such right of action accrued to the Price Administrator.

(f) That the Complaint be dismissed at the cost of the plaintiff. It is so ordered and counsel for defendant will submit appropriate judgment in accordance herewith.

(S) ALEXANDER AKERMAN,
United States District Judge.

In United States District Court

Decree

Filed April 7, 1944

This cause came on for final hearing upon the Second Amended Complaint and the several defenses interposed thereto and the evidence adduced by the respective parties, and the Court having heard the argument of counsel, upon consideration thereof,

It is ordered, adjudged and decreed that the Complaint be and it is hereby dismissed at the cost of the plaintiff.

Done and ordered at Jacksonville, Florida, this 6th day of April, A. D. 1944.

(S) ALEXANDER AKERMAN
District Judge.

In United States District Court

Notice of appeal

Filed April 17, 1944

Notice is hereby given that Chester Bowles, as Administrator of the Office of Price Administration, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit from the order dismissing the second amended complaint, entered in this action on the 7th day of April, 1944.

FRANK THOMPSON,
Frank Thompson,

District Enforcement Attorney, Office of Price Administration, Barnett National Bank Building, Jacksonville 2, Florida,

P. N. HIATT,
P. N. Hiatt,

Enforcement Attorney, Office of Price Administration, Seybold Building, Miami 32, Florida,

JOHN D. MOSBY,
John D. Mosby,

Chief of Litigation Unit, Office of Price Administration, Candler Building, Atlanta 3, Georgia,

C. H. LICHLITER,
C. H. Lichliter,

*Enforcement Attorney, Office of Price Administration, Wallace S Building, Tampa 2, Florida,
Attorneys for said Appellant.*

In United States District Court

Designation of record

Filed May 6, 1944

Appellant Chester Bowles, Administrator of the Office of Price Administration, plaintiff in the above entitled cause, hereby designates for inclusion in the Record on Appeal taken by him from the formal judgment in the above entitled action the complete record

and all the proceedings and evidence in said action, including without limitation the following:

1. Plaintiff's Second Amended Complaint.
 2. Plaintiff's Motion to Substitute Chester Bowles for Prentiss M. Brown as plaintiff and the Court's order directing such substitution.
 3. Defendant's Answer and Motion for Preliminary Injunction.
 4. Plaintiff's Motion to Dismiss and to Strike certain defences asserted in Defendant's Answer.
 5. Transcript of proceedings had and testimony taken in said cause on February 28, 1944, and February 29, 1944, at Miami, Florida, including each and all exhibits, stipulations and depositions introduced and received thereat.
 6. Transcript of proceedings had and testimony taken in said cause on March 27, 1944, and March 28, 1944, at Orlando, Florida, including each and all exhibits, stipulations and depositions introduced and received thereat.
 7. Remarks of the Hon. Alexander Akerman, District Judge in the decision of said cause at Orlando, Florida, on March 28, 1944.
 8. Findings of Fact and Conclusions of Law filed herein, together with the direction for the entry of judgment thereon.
 9. Decree of Dismissal filed herein.
 10. Notice of Appeal with date of filing.
- Dated May 1, 1944.

(s) FRANK THOMPSON,
Frank Thompson,

District Enforcement Attorney, Office of Price Administration, Barnett National Bank Building, Jacksonville 2, Florida.

(s) P. N. HIATT,
P. N. Hiatt,

Enforcement Attorney, Office of Price Administration, Seybold Building, Miami 32, Florida.

(s) JOHN D. MOSBY,
John D. Mosby,

Chief, Litigation Unit, Office of Price Administration, Candler Building, Atlanta 3, Georgia.

(s) C. H. LICHLITER,
C. H. Lichliter,

Enforcement Attorney, Office of Price Administration, Wallace S Building, Tampa 2, Florida.

Due service of the within Designation of Record is hereby admitted at Miami, Florida, this 5th day of May 1944.

LOFTIN, ANDERSON, SCOTT, MCCARTHY, &
PRESTON,

By (Signed) ROBERT H. ANDERSON,

Attorneys for Defendant.

Clerk's certificate

I, Edwin R. Williams, Clerk of the United States District Court in and for the Southern District of Florida, and as such the legal custodian of the records and files of said Court, do hereby certify that the foregoing pages numbered from 1 to 202, inclusive, contain a correct transcript of the record of the judgment in the case of Chester Bowles, as Administrator of the Office of Price Administration, Plaintiff, v. Seminole Rock & Sand Company, a corporation, Defendant Number 896 Miami—Civil and a true copy of all such papers and proceedings in said cause, as appear upon the records and files of my office, that have been directed to be included in said transcript by the written directions of the Appellant.

In witness whereof I hereto set my hand and affix the seal of said Court at Miami, Florida, this 22nd day of May A. D. 1944.

EDWIN R. WILLIAMS,
Clerk, United States District Court for the Southern
District of Florida,

[SEAL]

By ANNA M. FITZSIMMONS,
Deputy Clerk.

200 In the United States Circuit Court of Appeals for the Fifth
Circuit

No. 11032

CHESTER BOWLES, AS ADMINISTRATOR OF THE OFFICE OF PRICE
ADMINISTRATION, APPELLANT

vs.

SEMINOLE ROCK & SAND COMPANY, APPELLEE

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that the following portions of the typewritten transcript of record as certified by the Clerk of the United States District Court, for the Southern District of Florida, Miami Division, may be eliminated from the printed transcript, and that such omission be shown by appropriate recital in the printed transcript.

1. Motion of Chester Bowles to be substituted in place of Prentiss M. Brown.

2. Exhibit A attached to the answer contains certain pencil or pen notations other than the signature of Mr. Kellogg. It is

stipulated that only the printed and typewritten portion of said Exhibit and the signature of Mr. Kellogg be printed.

3. Exhibit B of the answer—it is proposed to omit the box at the upper right hand corner entitled "For Customer's use only."

4. Defendant's Exhibits A, B, C, D, and E be not again printed, because they are the same exhibits as are attached to the defendant's answer, marked by the same letters, see Miami transcript pages 50, 51, 52, and 53.

5. The letter of Mr. Anderson addressed to Mr. Hiatt dated January 13, 1944, advising of the postponement of the taking of deposition of the witness Smith to Monday, January 17, at 2 P. M.

201 6. Plaintiff's Exhibit A described in the stipulation of counsel signed March 17, 1941, relating to the admission of certain documentary proof which was offered at pages 3 and 4 of the Orlando transcript. In connection with this exhibit it is agreed that if defendant consents to the elimination of said exhibit from the printed record, that the appellant will at the time the printed record is filed with the Clerk of the Circuit Court deliver to counsel for the appellee 3 copies of said exhibit, and

It is further agreed that both parties hereto may make such use as either party desires to make of said exhibit, either in his brief or at oral argument, it being the sole intention of this stipulation only to avoid the printing thereof but not to exclude said exhibit from the record.

7. Defendant's Exhibit 2 offered by defendant at Orlando, transcript pages 86 to 88, was objected to by the plaintiff and excluded by the Court. It is stipulated that said exhibit be not printed.

FLEMING JAMES, Jr.,
Fleming James, Jr.,
Director, Litigation Division,
DAVID LONDON,
David London,
Chief, Appellate Branch,
Attorneys for Plaintiff-Appellant.
RUARK & RUARK,
Attorneys for Defendant-Appellee.

202 In United States Circuit Court of Appeals, Fifth
Circuit

No. 11032

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINIS-
TRATION

v.

SEMINOLE ROCK & SAND COMPANY

Argument and submission.

October 19th, 1944

On this day this cause was called, and, after argument by David London, Esq., Chief, Appellate Branch, Office of Price Administration for appellant, and Robert Ruark, Esq., and J. M. Hamp-hill, Esq., for appellee, was submitted to the Court.

In the United States Circuit Court of Appeals for the Fifth
Circuit

No. 11032

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINIS-
TRATION, APPELLANT

v.

SEMINOLE ROCK & SAND COMPANY, APPELLEE

Appeal from the District Court of the United States for the
Southern District of Florida

(November 14, 1944)

Before HUTCHESON, HOLMES, and WALLER, Circuit Judges.

Opinion

HOLMES, Circuit Judge: This appeal is from a final judgment dismissing an action by the Price Administrator under Section 205 (a) and (e) of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. Code App. Supp. 11, Secs. 901, 925 (a) and 925 (e), hereinafter referred to as the Act). The action was brought to restrain the defendant from continuing to violate the Act and Maximum Price Regulation 188 (7 F. R. 3872) issued thereunder, and to recover from defendant-appellee three times the

amount by which the sales prices of certain ballast (crushed stone) sold by the defendant to the Seaboard Air Line Railway were alleged to have exceeded the maximum price permitted by the regulation.

In the fall of 1942 the Seminole Rock and Sand Company sold and delivered 25,239.25 tons of crushed stone to the Seaboard Air Line Railway at 85¢ per ton. Between December 1942 and May 1943, the company sold and delivered 92,316.15 tons of the same stone to the same purchaser at \$1 per ton. The stone was delivered for use by the purchaser in maintaining the roadbed of the main line of its railroad.

Alleging that the highest price permitted by said Maximum Price Regulation 188 was 60¢ per ton for the material, the Price Administrator brought this suit, which the court below dismissed on the grounds (1) that whatever cause of action existed to recover a money judgment was in the purchaser of the stone, not the Price Administrator, and (2) that the evidence did not show any violation of Price Regulation 188.

Section 203 (e) of the Emergency Price Control Act of 1942, as amended by the Stabilization Extension Act of 1944, provides that if a person selling a commodity violates a regulation prescribing a maximum price, the person who buys the commodity "for use or consumption other than in the course of trade or business" may bring an action against the seller on account of the overcharge; but if the purchaser for any reason is not entitled to bring the action, the Administrator may institute such action in behalf of the United States.

The validity of this regulation is not questioned, and its language is so free from ambiguity that we have no need to explore its origin and purpose to determine its meaning. The effect of its application to the situation found in this case is also clear. The stone was delivered to the railroad for use in maintaining its roadbed, and it was consumed for that purpose. The fact that the purchaser was the ultimate consumer of the material is of no significance, for the statute impliedly excludes not only purchasers for use in the course of trade, but also purchasers for consumption in the course of business.¹ The maintenance of its tracks, roadbeds, and rights-of-way is an essential part of the business of any railroad. These purchases, therefore, were of a commodity consumed in the course of business of the purchaser, and if the price charged exceeded the maximum provided by the regulation, the cause of action arising from such unlawful act was vested by the statute in the Price Administrator only.

¹ Cf. Sen. Rep. 931, 77th Cong., 2d Sess., page 8; H. Rep. 1658, 77th Cong., 2d Sess., page 26.

Upon the merits the issue turns upon whether the seller's ceiling price for the stone sold was 60¢ per ton, as contended by the Administrator, or \$1.50 per ton, as claimed by the seller and as found by the court below.

These are the relevant facts: During the fall months of 1941, the Seaboard Air Line Railway placed with the appellee two orders for 5000 tons each of crushed stone. These orders promptly were accepted for delivery upon demand at 60¢ per ton. During the month of January 1942, a Government contractor placed an order with appellee for 7000 cubic yards of crushed stone (meeting certain specifications) for delivery upon demand at \$1.50 a cubic yard, and appellee promptly began its preparations for delivery, crushing the stone in accordance with the specifications and piling it at loading points. The railway company called for delivery of its orders during the month of March 1942, and delivery was then effected in accordance with the agreements reached during the preceding fall. The government contractor, after accepting delivery of a part of his order in January 1942, did not request any further deliveries until after March 1942.

It appears that there is no appreciable difference between a cubic yard of crushed stone and a ton of the same material. There is also ample evidence to support the findings of fact by the trial court that the Government contractor and the railroad were purchasers of the same class, and that the stone delivered to the contractor and that delivered to the railroad were composed substantially of the same material. Indeed, the evidence shows that deliveries to each were filled from the same piles of stone.

On April 28, 1942, the Administrator promulgated a General Maximum Price Regulation by which the prices of all commodities were frozen at the highest price charged therefor in March 1942. Shortly thereafter, the maximum price chargeable for the specific commodity here sold was fixed by Maximum Price Regulation 188. Section 1499.153 (a) thereof provided that the "maximum price for any article which was delivered or offered for delivery in March 1942 by the manufacturer, shall be the highest price charged by the manufacturer during March 1942 (as defined in Section 1499.163), for the article". Section 1499.163 (a) (2) provides that the highest price charged during March 1942 means (i) the highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March 1942; or (ii) if the seller made no such delivery during March 1942 such seller's highest offering price to a purchaser of the same class for delivery of the article or material during that month.

The appellee contends that its arrangement with the Government contractor bound it to offer the material for delivery each day during March 1942 at \$1.50 per cubic yard, and that this figure, being the highest price it charged during that month, became its maximum price for the material. The Administrator, pointing out that the seller made an actual delivery during 205 March 1942 under the 60¢ per ton contracts, argues that paragraph (ii) *supra*, relating to offers for delivery during March, has no application, and that paragraph (i) fixed the maximum price at 60¢ per ton.

We cannot agree with the Administrator that the regulation was intended to be so construed. In order to be binding upon and enforceable by the courts, administrative interpretations either of the law or regulations having the force and effect of law must be in harmony with and tend to effectuate the cardinal purposes of the law, and may not be unreasonable.² Moreover, since this court has no jurisdiction to consider the validity or invalidity of these particular regulations, we must accept and apply them in a manner consistent with their validity.³

The plain intentment of the statutes and regulations by means of which prices were frozen was to fix those prices indiscriminately at the highest price for which an article of commerce was bought and sold in legitimate trading in the due course of business during March 1942. The Act requires that the "prices established must be fair and equitable, and in fixing them the Administrator is directed to give due consideration, so far as practicable, to prevailing prices during the designated base period".⁴

Guided by these criteria, what do the interpretative regulations mean when construed in the light of the facts of this case? Here the seller had two enforceable contracts, made at arms-length in the due course of business prior to March 1942 under which it was required to deliver its products at the demand of the purchasers. The agreed selling price under the one was as much a "prevailing price" during the base period as was the selling price of the other. Each purchaser had an equal right to demand, or not to demand, delivery under his contract during the month of March. In these circumstances, does "fairness and equity" in determining the highest price charged require that the highest of these contract prices should control, or should the maximum price chargeable for future business be fixed at the smaller price on the superficial basis that one purchaser chanced to require a delivery in March and the other did not?

² *Stewart v. Kahn*, 11 Wall. 493; *In re Chapman*, 166 U. S. 681.

³ Sec. 204 (d) of the Emergency Price Control Act of 1942, 50 U. S. C. A., Sec. 924

(d). Cf. *Yakus v. United States*, 321 U. S. 414.

⁴ *Yakus v. United States*, 321 U. S. 414, 423.

We do not think the cited regulations compel a result so unreasonable and so antagonistic to the letter and spirit of the Act as that contended for by the Administrator. Under Section 1499.153 (a) of Regulation 188, either the delivery or offer of delivery of an article during March 1942 is sufficient to fix a maximum price for that article. Section 1499.163 (a) (2) (i) thereof defines the "highest price charged" to mean the highest price that the seller charged for delivery during March 1942, not the highest price charged for material that actually was delivered during that month. There is a profound difference, for there was a charge for delivery to the Government contractor of \$1.50 per cubic yard throughout the month of March whether or not any material actually was delivered to him at that time.

This interpretation is not precluded by the language of Section 1499.163 (a) (2) (ii). This section does not deal with deliveries or offers of delivery under contracts existing prior to the base period. It does not provide that the seller's highest price charged for goods offered for delivery in March shall fix the alternative maximum price. It rather provides that if the seller made no such delivery, that is, if subsection (i) had no application, then the seller's highest offering price for delivery during that month shall prevail. This section obviously relates to prices quoted by the seller in negotiations for sales for delivery during March, which sales were not consummated; for if such negotiations had ripened into sales for delivery during March, if such offering price for delivery, rather than such offer of delivery, had been accepted, this section, by its own terms, would not have been applicable. Then there would have been a delivery in March requiring the application of subsection (i).

These two subsections, together with subsection (iii) which manifestly has no application here, were intended to provide a yardstick for determining what was the highest price charged in every situation to which Section 1499.153 (a) applied. If no delivery under either contract had actually been made during March 1942, the offers of delivery under the contracts still would have been adequate to make this section applicable, yet in such case neither subsections (ii) or (iii) could be applied to determine the highest price charged during that month. For this additional reason, it seems clear that subsection (i), by using the language "charged" for delivery, embraces not only charges for deliveries actually made during that month, but also charges for delivery offered under the settled terms of pre-existing contracts.

For these reasons, we hold that subsection (i) is the regulation controlling the maximum price of the material, and that under said regulation the maximum price chargeable by this seller was \$1.50

196 CHESTER BOWLES VS. SEMINOLE ROCK & SAND CO.

per cubic yard at the time the sales complained of were made. Since the sales price of the shipments did not exceed the maximum price, the seller violated no law or regulation, and the Administrator is not entitled to a money judgment or to injunctive relief.

The judgment dismissing the suit is affirmed.

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In United States Circuit Court of Appeals

No. 11032

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION

v.

SEMINOLE ROCK & SAND COMPANY

Judgment

November 14, 1944

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida; and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court dismissing the suit in this cause be, and the same is hereby, affirmed.

Clerk's certificate

UNITED STATES OF AMERICA,

United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 202 to 211 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 11032, wherein Chester Bowles, Administrator, Office of Price Administration is appellant, and Seminole Rock & Sand Company is appellee, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 201 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my

office in the City of New Orleans, Louisiana, in the Fifth Circuit,
this 28th day of November A. D. 1944.

[SEAL]

OAKLEY F. DODD,
*Clerk of the United States Circuit Court of
Appeals, Fifth Circuit.*

208 Supreme Court of the United States

Order allowing certiorari

Filed March 12, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. —

**CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, PETITIONER**

v.

SEMINOLE ROCK & SAND COMPANY

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT**

Chester Bowles, Price Administrator of the Office of Price Administration, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the above entitled case entered on November 14, 1944, affirming the decision of the District Court.

OPINIONS BELOW

The oral opinion of the District Court (R. 191-194) has not been reported. The opinion of the Circuit Court of Appeals (R. 202-206) is reported in 145 F. (2d) 482.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 14, 1944. (R. 207.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 25, 1925.

QUESTIONS PRESENTED

Whether, under Maximum Price Regulation No. 188 (as well as under 46 other maximum price regulations which in the respects here relevant use identical or substantially identical language), a seller's maximum price for a commodity covered by the regulation is the highest price at which he made an actual delivery of the commodity during March, 1942 (in a case in which he did make such a delivery during that month), or whether, as the court below held, the seller is permitted by the Regulation to charge a higher price at which he had merely contracted for delivery in March, 1942.

STATUTE AND REGULATIONS INVOLVED

The statute and regulation involved are Section 205 (e) of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. Supp. III 925 (e)) and Maximum Price Regulation 188 (7 F. R. 5872) issued under Section 2 (a) of that Act.

As originally enacted Section 205 (e) read:

If any person selling a commodity violates a regulation, order, or price schedule

prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

As amended by Section 108 (b) of the Stabilization Extension Act of 1944 (Public Law 383—78th Cong. approved June 30, 1944) the section provides:

If any person selling a commodity violates a regulation, order, or price schedule

prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates

a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action, for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

Section 108 (c) of the Stabilization Extension Act of 1944, *supra*, provides:

The amendment made by subsection (b) insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of

this Act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.

The pertinent provisions of Maximum Price Regulation No. 188, as amended, which establishes maximum prices for building materials (including crushed stone) and consumer durable goods other than apparel, are as follows:

Sec. 1499.151. *Applicability of the General Maximum Price Regulation.*—The provisions of secs. 1499.1 to 1499.3, inclusive, and sec. 1499.18, of the General Maximum Price Regulation shall not apply to sales or deliveries by manufacturers of certain building materials and of certain consumers' goods set forth in sec. 1499.166, Appendix A, of this Maximum Price Regulation No. 188. All other sections of the General Maximum Price Regulation, together with existing and subsequent amendments and supplementary regulations, shall apply to sales and deliveries by such manufacturers, and are hereby incorporated by reference into this Maximum Price Regulation No. 188.

Sec. 1499.153 (a). *Articles priced in March 1942.*—The maximum price for any article which was delivered or offered for delivery in March 1942, by the manufacturer, shall be the highest price charged by the manufacturer during March 1942 (as defined in Sec. 1499.163), for the article.

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Sec. 1499.163 (a) (2).⁴ "Highest price charged during March 1942" means

(i) The highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March 1942; or

(ii) If the seller made no such delivery during March 1942, such seller's highest offering price to a purchaser of the same class for delivery of the article or material during that month; or

(iii) If the seller made no such delivery and had no such offering price to a purchaser of the same class during March, 1942, the highest price charged by the seller during March, 1942, to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers. * * *

(4) "Purchaser of the same class" and "class of purchaser" refer to the practice adopted by the seller in setting different prices for commodities for sales to different purchasers or kinds of purchasers (for example, manufacturer, wholesaler, jobber, retailer, government agency, public institution, individual consumer) or for purchasers located in different areas or for different quantities or under different conditions of sale.

Section 1499.20 (d) of the General Maximum Price Regulation, 7 F. R. 8156, incorporated by refer-

ence into Maximum Price Regulation 188 (see sec. 1499.151, *supra*), reads as follows:

Delivered.—A commodity shall be deemed to have been “delivered” during March 1942, *if during such month it was received by the purchaser or by any carrier, including a carrier owned or controlled by the seller, for shipment to the purchaser. [Italics supplied.]*

STATEMENT

Respondent is a manufacturer of crushed stone and similar commodities subject to Maximum Price Regulation 188. The highest price which it charged for crushed stone actually delivered in March 1942 was 60¢ a ton. (R. 194.) The delivery was made to Seaboard Air Line Railway in pursuance of a contract made the previous fall. After the effective date of Maximum Price Regulation No. 188, respondent sold to the same purchaser for use in the maintenance of its road-bed, 25,239.25 tons at 85¢ a ton and 92,316.15 tons at \$1.00 a ton. (R. 194.) The sales were made despite the fact that on July 3, 1942, the Seaboard Air Line Railway had written respondent calling attention to the fact that under the regulations issued by the Office of Price Administration it was unlawful for it to pay to respondent a higher price for crushed stone than the highest price at which respondent sold or offered to sell the same or similar commodity in March 1942 (R. 168), and

that respondent had replied saying: " * * * we beg to advise that the highest price at which we sold ballast in March 1942 was seventy-five cents (75¢) per ton" (R. 169-170).

Alleging that the highest price at which respondent could lawfully sell crushed stone of the kind sold to the Seaboard Air Line Railway was 60¢ a ton, petitioner brought this action to enjoin respondent from violating the Act and regulation and to recover from the defendant a judgment for three times the amount by which the sales prices of the crushed stone sold by the respondent after the effective date of the regulation to the Seaboard Air Line Railway exceeded 60¢ a ton. By way of defense, respondent showed that in January 1942 it had entered into a contract to sell crushed stone to a government contractor at \$1.50 a ton to be delivered as called for. (R. 194.) No delivery was made under this contract in March 1942. (R. 195.) A small part of the stone subject to this contract was delivered in January 1942 but the stone so delivered was admitted by respondent not to be the same kind as that sold to the Seaboard. (R. 17-18.) The balance of the stone subject to the contract, which respondent claimed was the same as that sold to the Seaboard, was not delivered until August 1942 (R. 195).

The District Court dismissed the action on the grounds (1) that whatever cause of action ex-

isted to recover a judgment under section 205 (e) of the Act was vested in the purchaser and not in the Administrator, and (2) that \$1.50 a ton, the price at which respondent had contracted to sell crushed stone to the government contractor, and not 60 cents a ton, the highest price at which respondent had actually delivered crushed stone in March 1942, was the maximum price at which respondent could lawfully sell that commodity under the regulation (R. 195-196). The Administrator appealed (R. 196).

The Circuit Court of Appeals held that whatever cause of action existed under Sec. 205 (e) because of the alleged over-the-ceiling sales was vested in the Administrator and not in the purchaser, but that the price called for by an executory contract under which the purchaser was entitled to demand delivery in March 1942 was a price charged for delivery in March 1942 within the meaning of Section 1499.163 (a) (2) (i) of the regulation, and that therefore \$1.50 a ton and not 60 cents a ton constituted respondent's maximum price for crushed stone under the regulation. (R. 202-206.) Accordingly, it affirmed the judgment of the district court. (R. 207.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that the price called for by an executory contract under which the purchaser was

entitled to demand delivery in March 1942 constituted a "price charged for delivery in March 1942" within the meaning of the regulation even though there was no actual delivery under the contract in March 1942.

2. In affirming the judgment of the district court.

REASONS FOR GRANTING THE WRIT

1. The primary reason for granting the writ is that the decision of the court below puts in question the correctness of the basis upon which millions of maximum prices have been established. The question here involved, affecting the determination of base-period prices in March 1942, is vital under the General Maximum Price Regulation, issued April 28, 1942, which is still in effect, and under those specialized Price Regulations subsequently issued which, while removing specific commodities from the coverage of the General Maximum Price Regulation, retain the base-period method of determining prices, as distinguished from the establishment of dollars-and-cents ceilings or margin formulas. The regulation here specifically involved, No. 188, is one of these specialized regulations employing the base-period method, of which there are, in all, 47. The commodities covered by them are too numerous to be listed, but it can be said that they include household wares, furniture, household appliances and other consumer durable goods, sixty per cent of

all clothing, solid fuels, virtually all building materials, and countless chemicals, drugs and industrial materials. They comprise over a quarter of all commodities subject to price control.

It is obviously impossible to demonstrate how many sellers of commodities covered by Regulations of the type under consideration may have had offering prices for delivery during March 1942 (or prices fixed in contracts in force in that month under which such deliveries might have been made) that were higher than any prices at which deliveries were actually made during the month. Common knowledge, however, indicates that the number must be very large. New offering prices and new contracts are constantly being made. In March 1942, as the Court will judicially notice, prices were steadily rising. Thus the average of prices on forward-looking offers and contracts was higher than the average of prices on actual deliveries. At the same time the upward surge of prices accentuated the number of new quotations on transactions not yet actually consummated. Where these factors existed, established prices which have been in effect for more than two years have been unsettled by the decision below. If it stands, it will result in higher prices which, though indeterminate in extent and amount, will have serious consequences for the stabilization program.

2. The court below has given a construction to the regulation which is, contrary to the carefully

considered, consistent and well-known administrative interpretation. The regulation itself provides in Section 1499.163 (*supra*, p. 6) a succession of three definitions of the "highest price charged by a seller during March 1942". As appears from the face of the section itself, it is only where the first definition is inapplicable that the second is to govern, and only where both the first and the second are inapplicable is the third to govern. The first looks to the "highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March 1942". The second, which looks to the seller's "highest offering price to a purchaser of the same class for delivery of the article or material during that month" is pertinent only "if the seller made no such delivery during March 1942". The court below has permitted a seller to take the second price notwithstanding the fact that the first was applicable since deliveries of the material were actually made in March 1942. Any possible uncertainty regarding the meaning of the section would seem to have been dispelled by the definition of "delivery" in the General Maximum Price Regulation, incorporated by reference into Maximum Price Regulation 188 (see p. 8, *supra*), which requires receipt of the commodity by the purchaser or by a carrier for shipment to the purchaser.

The administrative construction has followed the plain meaning of the provision. Concurrently

with the issuance of the General Maximum Price Regulation, the Administrator distributed a bulletin entitled "What Every Retailer Should Know about the General Maximum Price Regulation", more than a million copies of which were ultimately distributed to the public. On pages 1 and 2 of the bulletin, which was in substantial part applicable and also made available to wholesalers and manufacturers, the following explanation was given concerning the present question (the italics are contained in the original):

The highest price charged during March 1942 means the highest price which the retailer charged for an article *actually delivered* during that month, or, if he did not make any delivery of that article during March, then his *highest offering price* for delivery of that article during March * * *

Each retailer should apply the following *tests in the order set forth*. If his maximum price can be established for an article under the first test, the retailer need look no further. Only if the price cannot be determined under the first test, may he go on to the second test, and only if it cannot be determined under the first and second tests, may he go on to the third test, and so on.

First Test: Same Article Delivered in March (Sec. 2 (a) (1))

The retailer must take as his maximum price for sales of an article after May 18 the highest price at which he delivered the

same article during March 1942. This is the basic test and the one that will be applicable in the majority of cases. It should be carefully noted that *actual delivery* during March, rather than the making of a sale during March, is controlling.

While the bulletin deals with the General Maximum Price Regulation, it is equally applicable to Maximum Price Regulation 188. As said by the Emergency Court of Appeals in *United States Gypsum Co. v. Brown*, 137 F. (2d) 360, 362, "under both regulations the highest price charged by a manufacturer for any article delivered by him in March, 1942, became his maximum price."

The position thus taken at the beginning has been consistently and repeatedly reaffirmed. The point was deemed to be sufficiently fundamental to be referred to by the Price Administrator in his First Quarterly Report to Congress. In that report the Administrator (at p. 40) explained:

"Highest price charged" means one of two things: (1) It means the top price for which an article was *delivered* during March 1942, *in completion of a sale* to a purchaser of the same class * * * (2) If there was no *actual delivery* of a particular article during March, the seller may establish as his maximum price the highest price at which he offered the article for sale during that month. [Italics supplied.]

Innumerable formal and informal interpretations have been issued to the same effect. Rulings

on the question appear in the manual of interpretations which the Administrator published and distributed in November 1942. Cf. C. C. H. War Law Service, par. 42,403.47 and par. 42,403.48.

The deliberate conclusion of the Price Administrator that prices of actual March deliveries should be the primary basis of maximum prices is supported by abundant reasons. The conclusion was reached only after careful study and in the light of definite and compelling considerations. In the first place, in the interest of certainty and the preservation so far as practicable of current price relationships, a base period of a month was deemed to be the maximum which was feasible. Transactions both before and after that month were, therefore, to be disregarded. In the second place, if mere offers or unconsummated contracts in force during that month were to be taken into account, it would be necessary to consider such intangible factors as the intent and bona fides of the parties, making enforcement difficult and introducing the possibility of easy evasion. Such transactions were, therefore, to be relied upon only in the absence of a definite and consummated delivery. In the third place, and most important of all, establishment of maximum prices on the basis of March delivered prices was necessary to preserve a semblance of the normal spread between prices at the various stages of production and distribution. The General Maximum Price Regulation froze prices simultaneously at all

levels of production and distribution at a time when prices generally were rising. One of the most intractable of the problems in relation to the regulation was the avoidance or minimizing of a "squeeze" resulting from the lag in advancing prices as between one stage of production or distribution and the next. This problem, as it related to the retail industry, was discussed by the Price Administrator in his First Quarterly Report to Congress. What he said disposes of any suggestion that his determination with respect to the issue involved was unreasonable (pp. 43-44):

Many of the goods sold at retail in March were stocked at an earlier period when wholesale costs were lower than the levels reached in that month. In the case of slow-moving merchandise and seasonal goods, this spread between the prices at which goods have been acquired and the prices at which they can be replaced under the March ceiling is considerable. In the course of time, as retailers are compelled to replace their merchandise, their margins—the spread between their cost of merchandise and their selling price—will be reduced.

* * * * *

Some relief is provided in these cases by the use of March *delivered* prices in the ceiling regulations, as distinguished from prices *quoted* in March. The use of delivered prices automatically rolls back the squeeze in some degree. This is because goods delivered in March were in many

cases ordered weeks and even months earlier and hence bore the prices that prevailed at the time the orders were placed. It was these prices that the regulation established as maximum, not the quoted March prices.

This delivered price provision was adopted at the suggestion of retailers. Its effect is to roll back the squeeze on a selective basis. The relief resulting from the provision is least where turnover was rapid and inventories were small, that is, in the case in which retail prices were based upon replacement cost and where need for relief is therefore slight. The relief is greatest where turnover was slow and inventories were large, that is, where the difference between inventory and replacement cost is greatest and where the need for relief is acute.

See also the Administrator's Second Quarterly Report, p. 27.

The gravity of a decision thus setting at naught the administrative construction of a price regulation is not confined to the precise clause here involved. Every consideration which underlies the principle of giving effect to administrative construction has special force and exigency where the construction is that of administrative regulations themselves, where elaborate efforts have been made to avoid any uncertainty in their meaning, and where they must be largely self-administered with assurance and uniformity in countless daily business transactions.

3. The court below stated that it would not be "fair and equitable", as required by the statute, to establish a maximum price dependent upon whether a purchaser having a contract at a higher price happened not to require delivery in March (R. 205). To the extent that the decision turns on a conception of unfairness resulting from an element of chance, it is in substantial conflict with decisions of the Emergency Court of Appeals, which has repeatedly recognized that an element of chance is inseparable from any type of regulation which fixes maximum prices at the prices charged in a base period. *Wilson v. Brown*, 137 F. (2d) 348; *Northwood Apartments Inc. v. Brown*, 137 F. (2d) 809; *United States Gypsum Co. v. Brown*, 137 F. (2d) 803. In the light of the considerations already described (*supra*, pp. 16-18), which were dominant in the formulation of the provision in question, the decision below appears to rest on a failure to appreciate the reasons which led to the adoption of the course which the court condemned.

Moreover, in suggesting that the construction which appears plain and which has been consistently adopted by the Administrator would not be fair and equitable under the statute, the court below has entered upon a province reserved for the Emergency Court of Appeals under the statutory provisions for the exclusive jurisdiction of the latter court with respect to questions of the

validity of a regulation. Cf. *Yakus v. United States*, 321 U. S. 414.

4. The decision below is inconsistent with that of the District Court for the Eastern District of Illinois in *Bowles v. Good Luck Glove Company*, 52 F. Supp. 942, which was affirmed on interlocutory appeal by the Seventh Circuit Court of Appeals, 143 F. (2d) 579.¹ In that case, the court, construing the similar provisions of the General Maximum Price Regulation, refused to accept as applicable the prices on articles delivered in March 1942 because those prices had been fixed under outstanding contracts antedating March by several months. In the present case, the court rejected, as controlling, prices on articles actually delivered in March 1942 for the very reason that there was an outstanding contract fixing a higher price. While the two cases are thus inconsistent, both have adopted a construction at complete variance with the Administrator's. In each case, the court undertook to apply the statutory standard that maximum prices must be generally fair and equitable, and in so doing considered only the individual case rather than the general fairness of the regulation as it has been consistently interpreted by the Administrator.

¹ The case is now pending in the circuit court of appeals on appeal from final judgment, the earlier appeal having been taken from an order denying a preliminary injunction.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted and that the case be expedited in this Court.

CHARLES FAHY,
Solicitor General.

THOMAS I. EMERSON,
*Deputy Administrator for Enforcement,
Office of Price Administration.*

JANUARY 1945.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 914

**CHESTER BOWLES, ADMINISTRATOR, OFFICE OF
PRICE ADMINISTRATION, PETITIONER**

v.

SEMINOLE ROCK AND SAND COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The oral opinion of the District Court (R. 181-184) is unreported. The opinion of the Circuit Court of Appeals (R. 191-196) is reported in 145 F. 2d 482.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 14, 1944 (R. 196). The petition for a writ of certiorari was filed in this Court on February 2, 1945. Certiorari was granted on March 12, 1945. Jurisdiction of this Court is invoked under Section 240 (a) of the

Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under Maximum Price Regulation No. 188, a seller's maximum price for a commodity covered by the regulation is the highest price at which he made an actual delivery of the commodity during March 1942 (in a case in which he did make such a delivery during that month), or whether, as the court below held, the seller is permitted by the regulation to charge a higher price at which he merely contracted to deliver in March 1942.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are Section 205 (e) of the Emergency Price Control Act of 1942 (56 Stat. 34, 58 Stat. 640, 50 U. S. C. App. Supp. III and 50 U. S. C. A. App., Sec. 925 (e)), and Maximum Price Regulation No. 188 (7 F. R. 5872 *et seq.*, 7967, 8943), issued under Section 2 (a) of that Act.

As originally enacted, Section 205 (e) read:

If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price.

whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

As amended by Section 108 (b) of the Stabilization Extension Act of 1944 (Pub. L. No. 383, 78th Cong., 2nd Sess., June 30, 1944, 58 Stat. 640, 50 U. S. C. A. App., Sec. 925 (e)), the Section now provides:

If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the

violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to

bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action, for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

Section 108 (c) of the Stabilization Extension Act of 1944 (50 U. S. C. A. App., note following Sec. 925 (g)):

The amendment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this Act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.

The pertinent provisions of Maximum Price Regulation No. 188 (7 F. R. 5872), as amended

(7 F. R. 7967, 8943), which establishes maximum prices for building materials (including crushed stone) and consumer durable goods other than apparel, are as follows:

SEC. 1499.151. *Applicability of the General Maximum Price Regulation.*—The provisions of secs. 1499.1 to 1499.3, inclusive and sec. 1499.18, of the General Maximum Price Regulation shall not apply to sales or deliveries by manufacturers of certain building materials and of certain consumers' goods set forth in sec. 1499.166, Appendix A, of this Maximum Price Regulation No. 188. All other sections of the General Maximum Price Regulation, together with existing and subsequent amendments and supplementary regulations, shall apply to sales and deliveries by such manufacturers, and are hereby incorporated by reference into this Maximum Price Regulation No. 188.

SEC. 1499.153 (a). *Articles priced in March 1942.*—The maximum price for any article which was delivered or offered for delivery in March 1942, by the manufacturer, shall be the highest price charged by the manufacturer during March 1942 (as defined in Sec. 1499.163), for the article.

SEC. 1499.163 (a) (2). "Highest price charged during March 1942" means:

(i) The highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March 1942; or

(ii) If the seller made no such delivery during March, 1942, such seller's highest offering price to a purchaser of the same class for delivery of the article or material during that month; or

(iii) If the seller made no such delivery and had no such offering price to a purchaser of the same class during March, 1942, the highest price charged by the seller during March, 1942, to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers. * * *

(4) "Purchaser of the same class" and "class of purchaser" refer to the practice adopted by the seller in setting different prices for commodities for sales to different purchasers or kinds of purchasers (for example, manufacturer, wholesaler, jobber, retailer, government agency, public institution, individual consumer) or for purchasers located in different areas or for different quantities, or under different conditions of sale.

Section 1499.20 (d) of the General Maximum Price Regulation, 7 F. R. 3156, incorporated by reference into Maximum Price Regulation No. 188 by Section 1499.151, *supra*, reads as follows:

Delivered.—A commodity shall be deemed to have been "delivered" during March 1942, if during such month it was received by the purchaser or by any carrier, includ-

ing a carrier owned or controlled by the seller, for shipment to the purchaser.

STATEMENT

Respondent is a manufacturer of crushed stone and similar commodities subject to Maximum Price Regulation No. 188. The highest price which it charged for crushed stone actually delivered in March 1942 was 60¢ a ton. The delivery was made to the Seaboard Air Line Railway in pursuance of a contract executed in the fall of 1941. (R. 182-183, 185; cf. R. 116, 13, 5-6). After the effective date of Maximum Price Regulation No. 188, respondent sold to the same purchaser for use in the maintenance of its roadbed, 25,239.25 tons at 85¢ a ton and 92,316.15 tons at \$1.00 a ton (R. 185). The sales were made despite the fact that on July 3, 1942, Seaboard had written respondent calling attention to the fact that under the regulations issued by the Office of Price Administration it was unlawful for it to pay to respondent a higher price for crushed stone than the highest price at which respondent sold or offered to sell the same or similar commodity in March 1942 (R. 160), and that respondent had replied saying: " * * * we beg to advise that the highest price at which we sold ballast in March 1942 was seventy-five cents (75¢) per ton" (R. 1).

Alleging that the highest price at which respondent could lawfully sell crushed stone of the kind sold to the Seaboard was 60¢ a ton, peti-

tioner brought this action to enjoin respondent from violating the Act and regulation, and to recover from respondent a judgment under Section 205 (e) of the Act for three times the amount by which the sales prices of the crushed stone sold by the respondent to Seaboard after the effective date of the regulation exceeded 60¢ per ton.¹ By way of defense, respondent showed that in January of 1942 it had contracted to sell crushed stone to V. P. Loftis Company, a government contractor engaged in the construction of a dam for the government at Stuart, Florida, for \$1.50 a ton to be delivered by respondent by barge at the dam site as called for.² (R. 20-21, 185.) The contract pro-

¹ Section 205 (e) as originally enacted (*supra*, pp. 2-3) provided that any one selling a commodity at a price in excess of that permitted by a regulation should be liable for three times the amount of the overcharge—to the buyer if the commodity was purchased for use or consumption other than in the course of trade or business, otherwise to the Administrator. As amended by Section 108 (b) of the Stabilization Extension Act of June 30, 1944 (*supra*, pp. 3-5) the section provides that the seller's liability shall be restricted to the amount of the overcharge if he proves that the violation of the regulation was neither wilful nor the result of a failure to take practicable precautions against the occurrence of the violation. By the express terms of the Stabilization Extension Act (*supra*, p. 5), this amendment is made applicable to pending actions. The respondent therefore will be entitled to the benefit of the amendment in the event of a reversal. Cf. *Bowles v. Franceschini*, 145 F. 2d 510 (C. C. A. 1); *Bowles v. Hasting*, 146 F. 2d 94 (C. C. A. 5).

² The price called for in the contract with the government contractor was \$2.50 a ton. The excess of that price over \$1.50 a ton was intended to cover transportation charges. (R. 15.)

vided for the sale of two different kinds of stone, one of which respondent claimed was the same or substantially the same as that delivered the Seaboard in March 1942, and the other of which respondent admitted was different (R. 15-17). No delivery was made under this contract in March 1942 (R. 185). A small part of the stone subject to this contract was delivered in January of 1942, but the stone so delivered was conceded by respondent to be a different stone from that sold to Seaboard (R. 15-16). The balance of the stone subject to the contract, including all of the stone which respondent claimed was the same as that sold to Seaboard, was not delivered until August of 1942 (R. 185). Immediately upon entering into the contract with the government contractor, however, respondent proceeded to build two stock piles from which it intended to make deliveries under the contract (R. 31-32). All or a portion of the stone in at least one of these piles—the one containing stone which respondent claimed was the same as that delivered to the Seaboard in March 1942—was sold and delivered to the Seaboard, and not to the government contractor (R. 16, 17, 33).

The district court dismissed the action on two grounds: (1) That the purchaser and not the Price Administrator was vested with whatever cause of action existed to recover a judgment under Section 205 (e) of the Act; and (2) that \$1.50 a ton, the price at which respondent had contracted to sell crushed stone to the govern-

ment contractor, and not 60 cents a ton, the highest price at which respondent had actually delivered crushed stone in March 1942, was the maximum price at which respondent could lawfully sell that commodity under the regulation (R. 186).³

The Circuit Court of Appeals held that whatever cause of action existed under Section 205 (e) because of the alleged over-the-ceiling sales was vested in the Administrator and not in the purchaser; but that the price called for by an executory contract under which the purchaser was entitled to demand delivery in March 1942 was a price charged for delivery in March 1942 within the meaning of Section 1499.163 (a) (2) (i) of the regulation, and that therefore \$1.50 a ton and not 60 cents a ton constituted respondent's maximum price for crushed stone under the regulation (R. 191-196). Accordingly, it affirmed the judgment of the district court (R. 196).

³ The District Court denied the Administrator's application for an injunction to restrain respondent from violating the Emergency Price Control Act because it was of the opinion that operation of the railroad would be impeded if it could not purchase ballast from respondent and respondent could not furnish ballast at the ceiling price without incurring a loss (R. 183-184). On appeal petitioner contended that the denial of an injunction for this reason was an abuse of discretion. Cf. *Lenroot v. Interstate Bakeries Corp.*, 146 F. 2d 325 (C. C. A. 8). The Circuit Court of Appeals, having decided that respondent had not violated the regulation, did not reach the question.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that the price called for by an executory contract under which the purchaser was entitled to demand delivery in March 1942 constituted a "price charged for delivery in March 1942" within the meaning of the regulation, even though there was no actual delivery under the contract in March 1942, but was an actual delivery at a lower price.

2. In affirming the judgment of the district court.

SUMMARY OF ARGUMENT

The maximum price regulation applicable to respondent's stone provides that the price ceiling shall be the highest price charged by the seller for delivery of the same commodity during March 1942, but that if no delivery was made during that month, the ceiling should be the highest offering price during the month. "Delivered" is defined in the regulation as meaning "received by the purchaser." The decision below that respondent's ceiling was not the highest price for stone received by the purchaser in March but the price fixed in a pre-existing contract under which no stone was delivered during that month is inconsistent with the plain terms of the regulation. The literal construction of the regulation is supported by a consistent and repeatedly reaffirmed administrative interpretation of this and similar

regulations upon the basis of which a vast amount of business has been transacted. The weight to be given to the Administrator's construction of his own regulation is obviously very great.

To the extent that the decision below was based upon the court's view that the regulation as interpreted by the Administrator was unreasonable and inconsistent with the statutory grant of authority, the court below invaded the province vested by Congress in the Emergency Court of Appeals, which alone has authority to determine whether a regulation comports with the statutory standards. The court also failed to give any consideration to the reasons which underlay the regulation, which show that it was a reasonable and necessary means of carrying out the statutory policy.

ARGUMENT

THE HIGHEST PRICE AT WHICH A SELLER ACTUALLY DELIVERED A COMMODITY IN MARCH 1942 CONSTITUTES HIS MAXIMUM PRICE FOR THAT COMMODITY

A. THE LANGUAGE AND ADMINISTRATIVE INTERPRETATION OF THE REGULATION

Section 1499.153 (a) of the regulation provides that "the maximum price for any article which was delivered or offered for delivery in March 1942, by the manufacturer, shall be the highest price charged by the manufacturer during March, 1942 (as defined in Sec. 1499.163) for the article."

Section 1499.163 provides that for the purpose of the regulation—

“Highest price charged during March 1942” means:

(i) The highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March 1942; or

(ii) If the seller made no such delivery during March 1942, such seller's highest offering price to a purchaser of the same class for delivery of the article or material during that month; or

(iii) If the seller made no such delivery and has no such offering price to a purchaser of the same class during March, 1942, the highest price charged by the seller during March, 1942, to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers; * * *

The regulation thus establishes a succession of three rules for determining the maximum price of any article. First, the seller is to take as his maximum price of any commodity to a purchaser of any class the highest price which he charged for a delivery of the same commodity to a purchaser of the same class in March 1942. Secondly, in the absence of such a delivery in March, he is to take his highest offering price to a purchaser of the same class for delivery of the same article during March 1942. Thirdly, in the absence of both such a delivery and offering price, he is to

take the highest price charged to a purchaser of a different class during March 1942, adjusted to reflect the seller's customary differentials between the two classes of purchasers.

As the regulation shows on its face, the three rules which it prescribes are mutually exclusive. The first clause—that the seller must take as his maximum price for any commodity to a purchaser of any class the highest price at which he delivered the same commodity to a purchaser of the same class in March 1942—must be applied if any deliveries were made during the month. Only if the first clause is inapplicable may the second clause be applied, and only if both the first and second clauses are inapplicable may the third be applied. Since the first clause applies where there has been a delivery, and the second, which relates to the “offering price,” only where there has been no delivery, it is clearly improper to use the offering price as the ceiling when there was an actual delivery during the month of March.

The court below held to the contrary, however, at least where the offer was under the terms of a preexisting contract; it construed the phrase “charged * * * for delivery” as embracing not only charges for actual deliveries but all charges for delivery offered under such contracts even though not actually made (R. 195).

The court apparently assumed that it was free to construe the language of the regulation as it

saw fit. It did not advert to the definition of "deliver" in General Maximum Price Regulation, Sec. 1499.20 (d), incorporated by reference into Maximum Price Regulation 188, by Sec. 1499.151 (quoted. (*supra* p. 6)). "Delivered" is therein defined as meaning "received by the purchaser or by any carrier * * * for shipment to the purchaser" during March 1942. This definition is, of course, a part of the regulation. It makes it plain that there is no delivery unless a commodity is actually received by the purchaser or by the carrier for shipment to him. *Brown v. Mars, Inc.*, 135 F. 2d 843, 856 (C. C. A. 8), certiorari denied *sub nom. Mars, Inc. v. Bowles*, 320 U. S. 798. Even if there should be a question as to the ordinary meaning of delivery, the definition embodied in the regulation itself is obviously controlling. *Fox v. Standard Oil Co.*, 294 U. S. 87, 95-96; *Marlene Lincus v. Bowles*, 144 F. 2d 874 (Em. Ct. App.). The definition leaves no room for any such concept of constructive delivery as is embodied in the opinion below. A commodity is not received by the purchaser in March by reason of the existence of an executory contract under which no shipments during the month are made.

The settled administrative construction has followed the plain meaning of the regulation. Concurrently with the issuance of the General Maximum Price Regulation, the Administrator

published a bulletin entitled "What Every Retailer Should Know About the General Maximum Price Regulation," more than a million copies of which were ultimately distributed to the public. On pages 1 and 2 of the bulletin, which was in substantial part applicable and also made available to wholesalers and manufacturers, the following explanation was given concerning the issue now before this Court (the italics are contained in the original):

The highest price charged during March means the highest price which the retailer charged for an article *actually delivered* during that month, or, if he did not make any delivery of that article during March, then his *highest offering price* for delivery of that article during March * * *.

Each retailer should apply the following tests in the order set forth. If his maximum price can be established for an article under the first test, the retailer need look no further. Only if the price cannot be determined under the first test; may he go on to the second test, and only if it cannot be determined under the first and second tests, may he go on to the third test, and so on.

First Test: Same Article Delivered in March (Sec. 2 (a) (1))

The retailer must take as his maximum price for sales of an article after May 18 the highest price at which he delivered the same article during March 1942. This

is the basic test and the one that will be applicable in the majority of cases. It should be carefully noted that *actual delivery* during March, rather than the making of a sale during March, is controlling.

While the bulletin deals with the General Maximum Price Regulation, it is equally applicable to Maximum Price Regulation No. 188. As said by the Emergency Court of Appeals in *United States Gypsum Company v. Brown*, 137 F. 2d 360, 362, "under both regulations the highest price charged by a manufacturer for any article delivered by him in March, 1942, became his maximum price." In fact, in the statement of considerations which accompanied Maximum Price Regulation 188, (see 7 F. R. 5873) as required by Section 2 (a) of the Act, he categorically stated that the regulation established "at the identical level of the General Maximum Price Regulation, maximum prices for articles dealt in during March, 1942." Only in respect to commodities not dealt in during March, 1942 was the regulation intended to prescribe different maximum prices from those prescribed by the General Maximum Price Regulation.

The administrative construction adopted at the beginning has been consistently and repeatedly reaffirmed. The point was deemed to be sufficiently fundamental to be referred to by the Price Administrator in his First Quarterly Report to Congress. In that report the Price Administrator (at p. 40) explained:

"Highest price charged" means one of two things: (1) It means the top price for which an article was *delivered* during March 1942, *in completion of a sale to a purchaser of the same class* * * * (2) If there was no *actual delivery* of a particular article during March, the seller may establish as his maximum price the highest price at which he offered the article for sale during that month. [Italics supplied.]

The same position has been uniformly taken in explanations and interpretations given to particular inquirers affected by the regulations. In view of the overriding importance of definiteness and certainty in the application of maximum price regulations, the Price Administrator early adopted the practice of issuing in writing, on request of any affected persons "official interpretations" of his regulations upon which the recipient is entitled to rely unless and until revoked.⁴ Thousands of such interpretations have been issued. Many more informal explanations have been given. It is impossible to say how many of these interpretations and explanations dealt with or assumed the point here in issue, but in view of the fundamental character of the point they must have been numerous.

By the process which has been described, the established construction of the Price Administrator has been woven into the fabric of the regu-

⁴ Revised Procedural Regulation No. 1, Section 54, 7 F. R. 8961, as amended 9 F. R. 10476.

lation. Millions upon millions of individual transactions have been settled upon the basis of it. That construction can thus claim for itself all the weight to which settled practice in human affairs is entitled. It is supported not merely by the presumed expertness of an administrative agency in determining the meaning of its own regulation. It is supported, even more importantly, by the fact that it has been outstanding and constantly applied and reapplied in innumerable transactions.

The court below in its opinion did not even refer to this settled administrative construction of the regulation but alluded to the Price Administrator's view as if it were a position taken for the first time in this lawsuit. The court then proceeded to discuss the language of the regulation and impressed its own gloss upon it. This was plain error. Whatever qualifications there may be upon the rule which attributes weight to a settled administrative construction, such a construction cannot be ignored even when it involves only the Administrator's views as to the meaning of the statute under which he is operating. *Skidmore v. Swift & Co.*, 323 U. S. 134, 137-140. The weight to be given to his construction of his own regulations should obviously be much greater; for then he is explaining his own intention, not that of Congress. This Court has gone so far as to say that the latter type of "interpretation is binding upon the courts." *Federal Communica-*

tions Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 143n.; cf. *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 325; *American Tel. and Tel. Co. v. United States*, 299 U. S. 232, 242; *Morgan Stanley & Co. v. Securities Exchange Commission*, 126 F. 2d 325 (C. C. A. 2).

It is not necessary to go that far here, however, inasmuch as the construction adopted by the court below is wholly without merit. As has been seen, the language of the regulation compels the construction placed upon it by the Price Administrator.

B. THE COURT IMPROPERLY INVADED THE JURISDICTION OF THE EMERGENCY COURT OF APPEALS

The decision below was clearly based upon the court's view that the Administrator's interpretation was "unreasonable" and "antagonistic to the letter and spirit of the Act" (R. 195). In being guided by such considerations the court seems to have been concerned with how the administrative discretion should have been exercised in order to conform to the statute, and not with what the Administrator's regulation was intended to mean. The court's sole function, however, was to interpret the regulation—that is, to give it the meaning which the Administrator intended it to have. The task of determining whether a regulation conforms to the statutory standards was assigned exclusively to another tribunal, the Emergency Court of Appeals. Cf. *United States v. Pepper*

Bros., 142 F. 2d 340 (C. C. A. 3); *Rogensweig v. United States*, 144 F. 2d 30 (C. C. A. 9), certiorari denied, No. 442, November 6, 1944; *Bowles v. American Brewery*, 146 F. 2d 842 (C. C. A. 4).

Inasmuch as the court below necessarily was required to interpret the regulation, it may be conceded that the court had authority to make use of the general principles relating to the construction of documents. This would permit the court to consider, as an aid to interpretation, the reasonableness or absurdity, and the legality, of the alternative constructions. But those factors are only a few among many to be given weight; the ultimate criterion is the intention of the writer of the document—in this case the Administrator. When the interpreting court proceeds to determine what the Administrator meant in disregard of the language he employed and the Administrator's own interpretation, because of its views as to the lawfulness of the regulation under the statute, it would seem to be invading the province of the Emergency Court. This, we submit, is what was done here.

Furthermore, although the court's judgment seems to have been based on its views as to the fairness and reasonableness of the Administrator's interpretation, it failed even to refer to the reasons which support the Administrator's action. As we shall show, there is abundant support for the fairness and reasonableness of the Adminis-

trator's deliberate conclusion that prices on actual deliveries in March should be the primary basis for the maximum price regulation.

The court said only that it is "a superficial basis" for the fixing of maximum prices that "one purchaser [having a contract at a lower price] chanced to require a delivery in March and the other [having a contract at a higher price] did not." (R. 194.) The court said that this is not "fair and equitable", as required by the statute. It is obvious, however, that a large element of chance is inseparable from any regulation fixing a maximum price at the price charged in some past period; this most assuredly does not invalidate such a regulation. *Wilson v. Brown*, 137 F. 2d 348 (Em. Ct. App.); *Northwood Apts., Inc. v. Brown*, 137 F. 2d 809 (Em. Ct. App.); *United States Gypsum Co. v. Brown*, 137 F. 2d 803 (Em. Ct. App.). Indeed the element of chance plays a large part in the operation of almost every general rule. It can seldom if ever be eliminated. As Mr. Justice Cardozo observed in *Fox v. Standard Oil Co.*, 294 U. S. 87, 102:

* * * If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict.

The Administrator's conclusion was reached only after careful study and in the light of definite and compelling considerations. In the first place,

in the interest of certainty and the preservation so far as practicable of current price relationships, a base period of a month was deemed to be the maximum which was feasible. Transactions both before and after that month were, therefore, to be disregarded. In the second place, if mere offers or unconsummated contracts in force during that month were to be taken into account, it would be necessary to consider such intangible factors as the intent and bona fides of the parties, making enforcement difficult and introducing the possibility of easy evasion. Such transactions were, therefore, to be relied upon only in the absence of a definite and consummated delivery. In the third place, and most important of all, establishment of maximum prices on the basis of March delivered prices was necessary to preserve a semblance of the normal spread between prices at the various stages of production and distribution. One of the most intractable of the problems arising from the freezing of prices simultaneously at all levels of production and distribution was the avoidance or minimizing of a "squeeze" resulting from the lag in advancing prices as between one stage of production or distribution and the next. This problem was discussed by the Price Administrator in his first quarterly report to the Congress. What he said disposes conclusively of any suggestion that his determination with respect to the issue involved was unreasonable (pp. 43-44):

Many of the goods sold at retail in March were stocked at an earlier period when wholesale costs were lower than the levels reached in that month. In the case of slow-moving merchandise and seasonal goods, this spread between the prices at which goods have been acquired and the prices at which they can be replaced under the March ceiling is considerable. In the course of time, as retailers are compelled to replace their merchandise, their margins—the spread between their cost of merchandise and their selling price—will be reduced.

* * * * *

Some relief is provided in these cases by the use of March *delivered* prices in the ceiling regulations, as distinguished from prices *quoted* in March. The use of delivered prices automatically rolls back the squeeze in some degree. This is because goods delivered in March were in many cases ordered weeks and even months earlier and hence bore the prices that prevailed at the time the orders were placed. It was these prices that the regulation established as maximum, not the quoted March prices.

This delivered price provision was adopted at the suggestion of retailers. Its effect is to roll back the squeeze on a selective basis. The relief resulting from the provisions is least where turnover was rapid and inventories were small, that is, in the case in which retail prices were based upon replacement cost and where need for

relief is therefore slight. The relief is greatest where turnover was slow and inventories were large, that is, where the difference between inventory and replacement cost is greatest and where the need for relief is acute.

See also Price Administrator's Second Quarterly Report, p. 27.

C. THE DECISION OF THE COURT BELOW IF ALLOWED TO STAND WILL INJURIOUSLY AFFECT THE STABILIZATION PROGRAM

An understanding of the crucial relation of the issue presented by this case to the structure of wartime price control requires a brief review of the development of that structure.

Prior to April 28, 1942, price control was selective in nature, applying only to certain named commodities each of which had been singled out and brought under control in a separate price schedule or maximum price regulation. The commodities thus selectively controlled accounted for approximately half of the total volume of sales in the economy at the wholesale level. On April 28, 1942, the Price Administrator, finding that the developing inflation could not be curbed by such piecemeal action, issued the General Maximum Price Regulation which at one stroke brought under control (with relatively minor exemptions) the entire balance of the economy.

Action of such breadth required the development of new techniques of price control which had

no close parallel in the regulations previously issued. The general method adopted was a "freeze" of all prices at the level, or in line with the level, of the highest prices charged by each individual seller in March 1942. So simple a formula, however, would not suffice to identify for each seller, with the requisite precision, the particular price, in a month of changing prices, which was thereafter to serve for each particular type of commodity and transaction as his maximum price. Detailed pricing rules accordingly had to be worked out. The rules thus established have remained in force ever since.

The General Maximum Price Regulation itself has been continued in effect as the basic regulation applicable to every commodity which has not been either specifically exempted from price control or subjected to a specialized maximum price regulation. Since April 28, 1942, a large number of such specialized regulations have been issued, each of them removing a commodity or group of commodities from the coverage of the General Maximum Price Regulation. Many of these specialized regulations adopted different techniques of control—such as the naming of specific dollars-and-cents prices or the prescription of a cost-plus-a-margin formula—which were considered to be better adapted to the particular commodity field involved. The question involved in the present case does not arise under these regulations. Others of the specialized regulations, however,

continued to make use of the "freeze" method of control. These regulations for the most part adopted the basic pricing provisions of the General Maximum Price Regulation. The regulation here involved—Maximum Price Regulation No. 188—is one of this number. All told, there are 47 such regulations, in which the present question arises in the determination of maximum prices. The ruling of the court below, if approved, would be controlling in the construction of all these regulations.

The commodities covered by these regulations are too numerous to be listed. An idea of their number and importance can be secured from the titles of the specialized regulations which are quoted in the margin.* Among the commodities covered by these regulations of the type here in-

* This group is made up of the following numbered regulations excluding No. 188: 224, Cement; 261, Finishing Hardware; 17, Pig Tin; 248, Manganese Ore; 314, Magnesium and Magnesium Alloy Ingot; 316, Coated and Bonded Abrasives; 327, Certain Non-metallic Minerals; 347, Mica; 405, Ferro Silicon; 489, Tungsten, Vanadium, Molybdenum, Cobalt and Other Alloys and Minerals; 497, Antimony Metal and Antimony Compounds; 220, Misc. Rubber Commodities; 300, Rubber Drug Sundries; 403, Rubber Commodities Purchased for Government Use; 477, Rubber Heels and Soles; 129, Converted Paper Products; 225, Printed Paper Commodities; 266, Toilet Tissue and Paper Towels; 449, Groundwood Specialty Papers; 450, Writing Paper; 451, Book Paper; 445, Distilled Spirits and Wines; 193, Domestic Distilled Spirits; 259, Domestic Malt Beverages; 154, Ice; 260, Cigars; 121, Solid Fuels; 177, Men's and Boys' Tailored Clothing; 332, Men's and Boys' Shirts and Pajamas; 36, Ace-

involved are household wares, furniture, household appliances and other consumer durable goods, a large percentage of all clothing, solid fuels, virtually all building materials, and countless chemicals, drugs and industrial materials. They comprise over a quarter of all commodities subject to price control.

The issue involved in the present case is fundamental in the determination of individual sellers' maximum prices under all of these regulations. All of them provide a series of pricing rules, the first three of which are generally identical with those involved in this case. Sellers are to apply the first rule if it is applicable. Only if the first rule cannot be applied may they apply the second. Only if the first and second rules cannot be applied may they apply the third, and so on. The various pricing rules were arranged in a carefully planned progression, with a view to their relative fairness and reliability and the effect of their application upon the price structure generally.

tone; 37, Butyl Alcohol; 170, Anti Freeze; 179, Pine Oil; 282, Private Formula Drugs and Cosmetic Products; 392, Packaged Drugs; 393, Packaged Cosmetics; 391, Household Soaps and Cleansers; 406, Synthetic Resins and Plastic Material; 472, Essential Oils; 447, Coal Tar; 543, Certain Barium Chemicals; 157, Sales and Fabrication of Textiles Apparel and Related Items for Military Purposes. The following Revised Maximum Price Regulations: 206, Vitrified Clay Products; 138, Ferro, Manganese and Manganese Alloys and Metals; 198, Silver; 131, Camelback and Tire and Tube Repair Materials; 180, Colored Pigments; and Revised Price Schedule 40, Builders' Hardware.

Sellers were not permitted to pick and choose among the various rules in order to apply the one which gave them the highest price. Each succeeding rule was put in the regulation not as an optional pricing method, but in order to deal with some situation not covered by any preceding rule and as part of a plan designed to avoid any situation in which, for the lack of any applicable rule, no maximum price could be established.

The decision of the court below confuses this basic concept of a planned sequence of pricing rules. It does so at the crucial point of demarcation between the very first of the pricing rules and the second. Thus every maximum price which has been established under the first and primary pricing method laid down in the regulation and others of the same type is at least potentially unsettled.

The first three of the pricing rules established in these regulations constitute an initial and basic group which should be explained together. This first group of rules applies where there was a transaction in March 1942 by the *same seller* in the *same commodity*. Given these conditions, there is a sequence of three rules. *First*, the seller is to take as his maximum price the highest price on an *actual March delivery* to a purchaser of the same class. *Second*, failing such a delivery he is to take the highest offering price for March delivery to a purchaser of the same class. *Third*,

failing such a delivery or offering price, he is to take the highest price on an *actual March delivery* to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers.

The decision of the court below in effect merges the second of the foregoing rules, or part of the second, with the first. It does this by construing the word "delivery" in the regulation to include not only actual delivery in March 1942 but some indeterminate range of contracts or offerings for March delivery. The result of the decision is to give a seller the benefit of any higher prices which he could establish on the basis of such unconsummated contracts or offerings, which properly can be considered only under the second rule, even though, since actual March deliveries were made, it is only the first rule which is applicable.

It is obviously impossible to demonstrate how many sellers of commodities covered by regulations of the type under consideration may have had offering prices for delivery during March 1942 (or prices fixed in contracts in force in that month under which such deliveries might have been made) higher than any prices at which deliveries were actually made during the month. Common knowledge, however, will indicate that the number must be very large. New offering prices and new contracts are constantly being made. In March 1942,

as this Court will judicially notice,* prices were steadily rising. Thus the average of prices on forward-looking offers and contracts was higher than the average of prices on actual deliveries. At the same time the upward surge of prices accentuated the normal number of new quotations on transactions not yet actually consummated. In all these situations, the decision of the court below has unsettled established prices—prices which have been in effect for more than two years. If approved, it will result in higher prices which are indeterminate in extent and amount but which will evidently have serious consequences for the stabilization program.

CONCLUSION

It is respectfully submitted that the judgment should be reversed and the cause remanded for further proceedings.

✓ CHARLES FAHY,
✓ *Solicitor General,*

✓ ROBERT L. STERN,
Special Assistant to the Attorney General.

HENRY M. HART, Jr.,
Associate General Counsel,

FLEMING JAMES,

DAVID LONDON,

ALBERT M. DREYER,

Office of Price Administration.

APRIL 1945.

* *Central Kentucky Natural Gas Co. v. Railroad Com'n*, 290 U. S. 264; *Banton v. Belt Line Ry. Corp.*, 268 U. S. 413; *Galveston Electric Co. v. Galveston*, 258 U. S. 388; *Lincoln Gas & Electric Co. v. Lincoln*, 250 U. S. 256.

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**CHARLES ELMORE DROPLEY
CLERK**

No. 914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, *Petitioner*

v.

SEMINOLE ROCK AND SAND COMPANY

**BRIEF OF RESPONDENT IN OPPOSITION TO THE
GRANTING OF WRIT OF CERTIORARI**

✓ ROBERT RUARK, Raleigh, North Carolina

✓ BENNETT H. PERRY, Henderson, N. C.

✓ ROBERT H. ANDERSON, Miami, Florida

J. M. HEMPHILL, Chester, S. C.

SAMUEL W. RUARK, Raleigh, N. C.

*Attorneys for Respondent, Seminole Rock &
Sand Company*

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IN THE

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CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, *Petitioner*

v.

SEMINOLE ROCK AND SAND COMPANY

**BRIEF OF RESPONDENT IN OPPOSITION TO THE
GRANTING OF WRIT OF CERTIORARI**

JURISDICTION

Respondent, of course, concedes the right of this Court in the exercise of its discretion, to take jurisdiction of the cause if good reason has been made to appear, but Respondent asserts that no good reason exists for the issuance of the Writ of Certiorari.

QUESTION PRESENTED

The question presented is whether the ceiling price of Respondent under the statute and regulations was the current price charged by the Respondent for delivery during the month of March, 1942, or was it the highest price at which Respondent made physical delivery under a long-term contract entered into in the fall of 1941 as contended by the Administrator?

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are those set forth in the petition of the Administrator and to which should be added the following:

Amendments to Maximum Price Regulation No. 188, particularly Amendment No. 3 issued December 4, 1942 (O.P.A. Document No. 7928), the pertinent portions of which are as follows:

"(iii) * * *

Provided, however, That

(a) If before April 1, 1942, the seller raised his prices for a commodity to all his classes of purchasers (or to all his classes of purchasers except those to which he was bound to make delivery during March, 1942, under a firm commitment made before the price rise), and

(b) If during March, 1942, he delivered the commodity at the increased price to at least one class of purchasers, then, in order to allow the seller to apply the price rise to any class of purchasers to which no delivery was made during that month after the price rise (except under a firm commitment made before the price rise), the highest price charged during March, 1942, shall be deemed to be:"

Press Release (O.P.A. No. 1223) dated December 5, 1942, for release to Saturday morning papers, December 5, 1942.

The pertinent language of this release is as follows:

"The effect is to allow one, who last March delivered at prices established by a contract signed many months before and who raised his prices generally before April 1, to bring his prices on the expiration of the contract in line with the increased prices he was charging in March. March is the base period under the two regulations."

U. S. C. A. Title 50, App. paragraph 942, (a) and (b) reading as follows:

"Parag. 942. DEFINITIONS

As used in this Act—

(a) The term 'sale' includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms 'sell,' 'selling,' 'seller,' 'buy,' and 'buyer,' shall be construed accordingly.

(b) The term 'price' means the consideration demanded or received in connection with the sale of a commodity."

Amendment No. 38 to General Maximum Price Regulation effective date December 10, 1942, issued December 5, 1942, O.P.A. Document No. 7926 (incorporated by reference into MPR 188). The pertinent provisions are provisions (1) and (2) and they are identical with Amendment No. 3 to Maximum Price Regulation 188, quoted above except that the amendment in the General Maximum Price Regulation incorporates services in addition to commodities as controlled by the Maximum Price Regulation.

General Maximum Price Regulation No. 1499.20, Subdivisions (h) (p) and (r), the pertinent parts of which are as follows:

"(h) 'Offering price' means the price quoted in the seller's price list, or; if he had no such price list, the price which he regularly quoted in any other manner * * *."

(p) 'Sale at wholesale' means a sale by a person who buys a commodity and resells it, without substantially changing its form, to any person other than the ultimate consumer * * *."

This change of language to read as above was made to the original regulation by amendment No. 7 of June 19, 1942, the word "buys" formerly read "receives delivery."

"(r) 'Sell' includes sell, supply, dispose, barter, exchange, lease, transfer, and deliver, and contracts and offers to do any of the foregoing. The terms 'sale,' 'selling,' 'sold,' 'seller,' 'buy,' 'purchase' and 'purchaser,' shall be construed accordingly."

FACTS

Respondent is a producer of crushed stone, a commodity subject to Maximum Price Regulation No. 188 and the amendments thereto. During the month of October, 1941, or just prior thereto, Respondent entered into a contract with the Seaboard Air Line Railway Company whereby it agreed to furnish the latter, on demand, crushed stone, generally known as ballast because of the purpose for which it was used, at a price of sixty cents (.60) per ton, to be delivered when called for by the purchaser. In the latter part of January, 1942, Respondent verbally made a firm commitment to sell and deliver, on demand, to V. P. Loftis Company crushed stone, substantially the same product, at one dollar and fifty cents (\$1.50) per cubic yard. The contract with Loftis was confirmed in writing February 11, 1942 (Exhibit A, R. p. 22). On January 15, 1942, there was an actual physical delivery to Loftis of a portion of the crushed stone Respondent had committed itself to deliver on demand. Respondent proceeded in good faith to crush and stockpile the crushed stone it had contracted to deliver Loftis on demand and as the stone was crushed and stockpiled it was inspected and accepted by a Government inspector, as being the product the Respondent was committed to deliver Loftis. On March 12, 1942 (R. p. 24) Loftis wired Respondent: "Operations on our Stuart contract to continue. Stop. Continue shipments on our order." Before Respondent was able to make further actual delivery Loftis advised Respondent that for reasons beyond Respondent's control, Respondent should not make further shipments until some date subsequent to the month of March, 1942. The buyer found that it would not be able to use any more of the commodity until after March, 1942, and so advised Respondent (Exhibit D, R. p. 24).

Solely by reason of the fact that Respondent had been advised by Loftis not to make further actual shipments during March, 1942, the only actual delivery made during the month of March of the same commodity was to the Seaboard Air

Line Railway Company for the purpose of partial completion of the pre-existing contract entered into in October, 1941.

The courts below found upon substantial evidence that the commodity sold and delivered to the Seaboard Air Line Railway Company was substantially the same as that sold and delivered to V. P. Loftis Company, and likewise found that Loftis and Seaboard Air Line Railway Company were purchasers of the same class.

Under the contract of sale to Loftis there were two classes of stone. (Exhibit A, R. p. 22), Class A Stone and Class B Stone, the two classes differing only as to size and having the same market price of one dollar and fifty cents (\$1.50) per cubic yard.* The Class B Stone under the Loftis contract was the same commodity sold to the Seaboard Air Line Railway Company and was used interchangeably.

By another contract, between October 8, 1942, and December 15, 1942, Respondent sold and delivered to Seaboard Air Line Railway Company 25,239.25 tons of crushed stone at 85 cents per ton and by another contract commencing on or about December 15, 1942, sold and delivered to the Seaboard Air Line Railway Company 92,316.15 tons of crushed stone at \$1.00 per ton. These two last mentioned contracts and deliveries to the Seaboard Air Line Railway Company are the basis of the claim of the Administrator in so far as his action was for treble damages, and likewise on which he sought an injunction.

The District Court dismissed the action on the grounds (1) that whatever cause of action existed to recover a judgment under Section 205 (e) of the Act was vested in the purchaser and not in the Administrator, and (2) that \$1.50 per ton was the highest price "charged for delivery" of that commodity in March, 1942, thereby becoming the ceiling price on the commodity, and that the price of 60 cents per

* There is no appreciable difference between a cubic yard of crushed stone and a ton of the same material, as stated by the Circuit Court (R. p. 204).

ton for the same commodity delivered to the Seaboard Air Line Railway Company in March, 1942, under a pre-existing contract was not the maximum price at which Respondent could lawfully sell that commodity, as contended by the Administrator.

The Price Administrator appealed. The Circuit Court of Appeals disagreed with the District Court with respect to who had the right to maintain the action, holding that the Administrator and not the buyer had such right, but agreed with the District Court in its holding that \$1.50 per ton was Respondent's ceiling price for the commodity involved, as shown by the proper interpretation of the statute and pertinent regulations.

These concurrent findings of the two courts, as this Court has often held, should be accepted as conclusive unless clearly erroneous. *United States v. Commercial Credit Company*, 286 U. S. 63.

ARGUMENT OPPOSING GRANTING OF THE WRIT

I.

The primary reason assigned by the Petitioner for granting Certiorari in this case is his contention that "the decision of the Court below puts in question the correctness of the basis upon which millions of maximum prices have been established." Such a contention is incredible and altogether without support either in the record or by any process of reason. The ruling of the Court of Appeals does not in any wise affect any of the other prices established under the Administrator's regulations. Nor is there any support whatsoever for the Administrator's contention that the interpretation of the Act and Regulations affect adversely the determination of the base period. On the contrary, the Court clearly recognizes the month of March, 1942, as being the base period and that the core of the price regulation is its requirement that each seller charge no more than the price which he charged during the base period of March 1-31, 1942. Because of the evi-

dence showing that during the base period of March, 1942, the current price at which Respondent had not only contracted but also committed and prepared to deliver and had in fact constructively delivered the commodity to a purchaser of the same class, it concluded and held that \$1.30 per ton was the highest price "charged for delivery" of that commodity in March, 1942. Nor is there any support in the record for the Administrator's contention that the ceiling price so fixed was a forward looking offer or contract on a basis higher than the current prevailing price of March. On the contrary, it was clearly a firm commitment for delivery in March. Nor can there be any merit in the contention that the construction placed upon the Statute and Regulations by the Court can have the effect of unsettling the prices established by the Administrator's regulation.

It is a matter of common knowledge that manufacturers and producers of commodities continuously deliver all products produced promptly so that the chances are that another factual situation identical with those of the case at bar is most improbable and so altogether remote that there is practically no chance whatsoever of this decision having the slightest effect on any of the ceiling prices heretofore or hereafter established pursuant to the Act and Regulations.

As a matter of fact, the construction of the Statute and Regulation contended for by the Administrator would serve to defeat the Administrator's declared purposes as set out on page 16 of the Petition for the Writ of Certiorari. There the Administrator says "in the first place, in the interest of certainty and the preservation in so far as practicable of current price relationships, the base period of a month was determined to be the maximum which was feasible."

It can be immediately seen that if ceiling prices are to be determined solely upon the basis of actual deliveries made pursuant to contracts entered into in October, 1941, in utter disregard of current prices prevailing during the base period of March, 1942, the result would of necessity be that the

current prices of the base period of March, 1942, would be disregarded and in place thereof the ceiling prices would be fixed on the current price prevailing in the month of October, 1941; and correspondingly, although the Administrator says that a month is the maximum base period, the length of the base period is increased to run from October, 1941, to March, 1942, both inclusive.

The Regulation on its face apparently intended to make prices quoted in March, 1942, for immediate delivery, i.e., in March, 1942, as the ceiling. The Administrator, in drafting the regulations, surely never intended to go back for months to find a price that was made under an old contract which required a delivery in March, 1942. The whole purport of the Regulation is to use current prices in March, 1942.

II.

The second reason assigned by the Petitioner is that the Court gave a construction contrary to the carefully considered, consistent and well-known interpretations of the Regulation. Administrative interpretations are valuable where they have been of long standing, or widely known and unchallenged. Their value depends on the presumption of correctness that flows from the failure of parties affected to question the interpretation over a long period of time. No such rule should be invoked here.

The principle here stated is clearly set out in *Walling v. Swift & Co.*, 131 Fed. (2d) 249 (7th Cir.), the Court said, at page 252:

"We have given consideration to the fact that this is an administrative interpretation of the Act promulgated by the Department, but we do not think it has determinative influence. It must be remembered that this interpretation of the Department is new and affords the very basis of this controversy, in the making of which the defendant has challenged this ruling at its first opportunity.

"In our opinion for such a ruling to prove persuasive it should have been settled and acted upon by the Department and acquiesced in by those affected thereby for such time as would lead one to believe that because of the acceptance of this interpretation it had gained some sanction."

See, also, to the same effect: *W. P. Brown & Sons Lumber Company v. L. & N. R. R. Co.*, 299 U. S. 393, 57 Sup. Ct. Rep. 265; *Fort Worth and Denver City Ry. Co. v. Childress Cotton Oil Co.*, 48 Fed. Supp. 937; *Sandford's Estate v. Commissioner of Internal Revenue*, 308 U. S. 39, 60 Sup. Ct. Rep. 51, 60, and *Nagle v. O'Connor*, 88 Fed. (2d) 936, 939.

In addition to these considerations the Administrator in construing his own regulations could have worded it in any way he pleased and he could have made it mean what he now contends it means, provided, of course, it would not conflict with the Act from which his powers were derived.

In that connection sight should not be lost of the definition contained in Section 302 of the Emergency Price Control Act of 1942.

"(a) The term 'sale' includes sales, dispositions, exchanges, leases and other transfers, and contracts and offers to do any of the foregoing. The terms 'sell,' 'selling,' 'seller,' 'buy' and 'buyer' shall be construed accordingly."

To substantially the same effect is the promulgation of the Administrator, himself, see quotation above from 1499.20-(r).

It will thus be seen that both Congress and the Administrator placed sales and offers for sales on exactly the same basis.

III.

The third purported reason appears on page 19 of the Petition and is without merit. In the first place, it clearly appears from the decision itself (145 F. (2d), 482-5) that

the Circuit Court of Appeals, recognized its lack of jurisdiction to consider the validity either of the Act or the Regulation and specifically so stated in the following language:

"The validity of this Regulation is not questioned . . ."

And:

"Moreover, since this Court has no jurisdiction to consider the validity or invalidity of these particular Regulations; we must accept and apply them in a manner consistent with their validity."

The Court did properly interpret the Regulation which it not only had jurisdiction but had the duty to do when the question of its interpretation was presented to it and the power of the Court to interpret the Regulation is not only clearly recognized by the Court but has been insisted upon by the Administrator himself, as will appear from the language of the Court in the case of *Marlene Linen's v. Bowles*, 144 Fed. (2d), 874, as follows:

"The primary contention of the complainant is that the interpretation placed upon the Regulation by the Administrator's . . . office was wrong. The Administrator urges that this is the sole issue which Complainant seeks to raise and that in the absence of an attack upon the validity of the Regulation, such a question is not cognizable in this Court (U. S. Emergency Court of Appeals) he (Administrator) suggests that in an appropriate Court the Complainant may obtain a declaratory judgment as to the interpretation and applicability of the Regulation. He (Administrator) also suggests that in an enforcement proceeding against it for an alleged violation of the Regulation, the Complainant may defend on the ground that the Administrator's interpretation is erroneous and that the Regulation is inapplicable to it. We (the Court) agree that if the Complainant merely sought an interpretation of the Regulation, without in any way attacking the validity, it would not be cognizable by this Court."

It thus appears that the Administrator has not only never questioned the right and duty of a District Court or a Court of

Appeals to interpret a Regulation but has insisted that such Courts alone have the right so to do and that the Emergency Court of Appeals is altogether without jurisdiction so to do.

IV.

The fourth reason assigned by the Petitioner for granting a Writ of Certiorari is that the decision below is inconsistent with that of the District Court of the Eastern District of Illinois in *Bowles v. Good Luck Glove Company*, 52 F. Supp. 942. Actually, the Circuit Court of the Seventh Circuit has not finally acted upon the final judgment in the *Good Luck Glove Company* case, as noted by the Administrator's Petition. The action taken by the Circuit Court of Appeals was taken upon an interlocutory appeal from an order which denied an injunction and the merits of the case were not before the Court. The Circuit Court, however, did say that the District Court had filed an opinion with which the Circuit Court was in accord.

Even if that opinion by the Circuit Court of Appeals can be considered as a final adjudication on the merits of the issues involved, it appears, and is hereby demonstrated, that the decision in that case and in the case at bar are really not in conflict, except only to the extent that the final findings of fact as arrived at by the two Courts necessarily differ because of the existence of different states of facts and circumstances surrounding the respective transactions, warranting the application of different sections of the regulations involved.

As a matter of fact, the controlling and vital question in both cases is whether or not an actual delivery made under a pre-existing contract is the sole determinative factor in ascertaining the maximum price. In the *Good Luck Glove Company* case there were certain contracts which antedated the base period of March, 1942, by many months, and during March, 1942, there were deliveries of the commodities only under the pre-existing contracts, but there were absolutely no deliveries of those same commodities under general price in-

creases made and published during the month of March, 1942, until after the month of March, 1942. It was the contention of the Administrator that the ceiling prices for the specific commodities had been fixed by reason of the actual deliveries during March, which were made in partial compliance with the pre-existing contract. The Court held that the prices upon which the company had become committed some months before were not the maximum prices because such prices were not the current prevailing prices during the base period of March, 1942, and it was not the intention of Congress or the Administrator to fix the ceiling as of March at the prices fixed on outstanding contracts antedating March by several months. In the case at bar, it was the contention of the Administrator (just as it was in the *Good Luck Glove Company* case) that the ceiling price of Respondent's commodity had been fixed by reason of the fact that the only actual physical delivery it made was in partial compliance with a pre-existing contract entered into many months prior to the base period of March, 1942. Such a construction of the Statute and Regulations was rejected by the Circuit Court of Appeals for the Fifth Circuit, just as it was by the Seventh Circuit Court of Appeals. It thus conclusively appears that in each and both, the determinative opinion expressed by each of the two Circuit Courts of Appeal was to give to the Statute and Regulations an interpretation whereby the maximum price should be fixed on a basis of the current prices prevailing during the base period of March, 1942, and not on a basis of pre-existing contracts entered into many months before March, 1942.

The error into which the Petitioner falls when he says that the two cases are inconsistent becomes apparent when it thus clearly appears that each and both of the two Circuit Courts of Appeal, having given the same interpretation to the Statute and Regulations in holding that a contract antedating March by many months was not controlling, then proceeded to apply the proper method under the facts of each of the cases in

ascertaining ceiling prices applicable to the commodity in each case. In the *Good Luck Glove Company* case, this ceiling price was arrived at by applying the proper differentials appearing warranted by the peculiar facts of that case. In the case at bar, no differentials being involved, the Court properly applied the rule of the highest prices "charged for delivery" and thus arrived at the ceiling price of \$1.50 as found.

The Administrator is most evidently mistaken in contending that the Courts in the case at bar fixed the ceiling price of \$1.50 on Respondent's product by virtue of a pre-existing contract with V. P. Loftis Company. As a matter of fact, that was not the method used by the Courts. On the contrary, it is clear that the Courts arrived at the ceiling price of \$1.50 not because it was a pre-existing contract but because it was the Respondent's highest current price prevailing during the base period because of the fact that the Respondent had made a firm commitment to deliver at that price during March, had on hand the product for delivery which it had constructively delivered by its having been inspected, passed and actually ordered delivered, when circumstances beyond Respondent's control prevented actual physical delivery during the base period. The only evidence offered as to the highest price charged for delivery during the month of March, 1942, were the facts just outlined.

CONCLUSION

From the foregoing statements it is apparent that none of the reasons advanced by the Administrator has support either in the record or as logical or reasonable deductions therefrom. On the contrary, it conclusively appears that in the final analysis the decision in this case amounts to nothing more than a factual conclusion arrived at in a civil action based upon substantially identical reasonable interpretations of the Act and Regulation involved by two Circuit Courts of Appeal when applied to the particular facts of the case. Being thus nothing more than an adjudication to the effect that the Admin-

istrator is not entitled either to a recovery of damages or to an injunction, this case stands alone as the final determination of an action which in no way affects or interferes with the general declared purposes of the Emergency Price Control Act or its enforcement or the Regulations issued pursuant thereto. We are confident that this Court will not undertake to review findings of fact concurred in by both the District Court and the Circuit Court of Appeals.

It is respectfully submitted that the Petition should be denied.

ROBERT RUARK, Raleigh, North Carolina
BENNETT H. PERRY, Henderson, N. C.
ROBERT H. ANDERSON, Miami, Florida
J. M. HEMPHILL, Chester, S. C.
SAMUEL W. RUARK, Raleigh, N. C.

*Attorneys for Respondent, Seminole Rock &
Sand Company.*

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CHARLES CLARK
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BRIEF FOR THE RESPONDENT

IN THE
Supreme Court of the United States
October Term, 1944

No. 914

**CHESTER BOWLES, ADMINISTRATOR, OFFICE
OF PRICE ADMINISTRATION**

Petitioner

v.

SEMINOLE ROCK & SAND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS, FOR THE FIFTH CIRCUIT.

ROBERT RUARK, Raleigh, N. C.
BENNETT H. PERRY, Henderson, N. C.
ROBERT H. ANDERSON, Miami, Florida
J. M. HEMPHILL, Chester, S. C.
SAMUEL W. RUARK, Raleigh, N. C.
Attorneys for Respondent.

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SUMMARY OF ARGUMENT

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No. 914

IN THE

Supreme Court of the United States

October Term, 1944

CHESTER BOWLES, ADMINISTRATOR, OFFICE
OF PRICE ADMINISTRATION;

Petitioner

v.
SEMINOLE ROCK & SAND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS, FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court appears in the original record (R. pp. 181-187) though unreported in Federal Supplement. The opinion of the Circuit Court of Appeals (R. pp. 191-196) reported in 145 F. 2d, 482.

QUESTION PRESENTED

The question presented is whether the ceiling price of Respondent under the statute and regulations was the prevailing current price charged by the Respondent for delivery during the month of March, 1942, or was it the highest price at which Respondent made actual physical delivery in March, 1942, under a pre-existing contract entered into in October, 1941?

STATUTE, REGULATIONS, AND INTERPRETATIONS INVOLVED

The statute and regulations involved are those set forth in the petition of the Administrator and to which should be added the following:

Amendments to Maximum Price Regulation No. 188, particularly Amendment No. 3, issued December 4, 1942 (O.P.A. Document No. 7928), the pertinent portions of which are as follows:

"(iii) * * *

"Provided, however, That

"(a) If before April 1, 1942, the seller raised his prices for a commodity to all his classes of purchasers (or to all his classes of purchasers except those to which he was bound to make delivery during March, 1942, under a firm commitment made before the price rise), and

"(b) If during March, 1942, he delivered the commodity at the increased price to at least one class of purchasers, then, in order to allow the seller to apply the price rise to any class of purchasers to which no delivery was made during that month after the price rise (except under a firm commitment made before the price rise), the highest price charged during March, 1942, shall be deemed to be":

Press Release (O.P.A. No. 1223), dated December 5, 1942, for release to Saturday morning papers, December 5, 1942.

The pertinent language of this release is as follows:

"The effect is to allow one, who last March delivered at prices established by a contract signed many months before and who raised his prices generally before April 1, to bring his prices on the expiration of the contract in line with the increased prices he was charging in March. March is the base period under the two regulations."

O.P.A. Document 564, being a Press Release for immediate release Thursday, August 20, 1942, the pertinent language of which is as follows:

"A more direct method for sellers subject to the General Maximum Price Regulation to establish ceiling prices for classes of purchasers with which they did not deal in March was established today by the Office of Price Administration.

"At the same time O.P.A. *broadened* the conditions under which a seller may put in effect price increases announced during or prior to March, 1942, in cases where the seller did not make deliveries during March to all classes of purchasers at the higher prices.

"As amended, the Regulation permits a seller, who, during or prior to March, increased prices to all classes of purchasers of a commodity or service to make the increased prices his ceilings for each class of purchasers as long as he made delivery during March at the higher prices to any one of his classes of purchasers. However, if, after the general price increase the seller delivered to a class of purchasers only at a lower price, the lower price is the maximum price *unless the delivery was made under a contract.*" (Emphasis supplied.)

U.S.C.A. Title 50, App. paragraph 942, (a) and (b), reading as follows:

"Parag. 942. DEFINITIONS

"As used in this Act—

"(a) The term 'sale' includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms 'sell,' 'selling,' 'seller,' 'buy,' and 'buyer,' shall be construed accordingly.

"(b) The term 'price' means the consideration demanded or received in connection with the sale of a commodity."

Amendment No. 38 to General Maximum Price Regulation, effective date December 10, 1942, issued December 5,

1942, O.P.A. Document No. 7926 (incorporated by reference into MPR 188). The pertinent provisions are provisions (1) and (2) and they are identical with Amendment No. 3 to Maximum Price Regulation 188, quoted above except that the amendment in the General Maximum Price Regulation incorporates services in addition to commodities as controlled by the Maximum Price Regulation.

General Maximum Price Regulation No. 1499.20, Subdivisions (h) and (p) and (r), the pertinent parts of which are as follows:

"(h) 'Offering price' means the price quoted in the seller's price list, or, if he had no such price list, the price which he regularly quoted in any other manner * * *"

"(p) 'Sale at wholesale' means a sale by a person who *buys* a commodity and resells it, without substantially changing its form, to any person other than the ultimate consumer * * *" (Emphasis supplied.)

This change of language to read as above was made to the original regulation by Amendment No. of June 19, 1942; the word "buys" formerly read "receives delivery."

"(r) 'Sell' includes sell, supply, dispose, barter, exchange, lease, transfer, and deliver, and contracts and *offers to do* any of the foregoing. The terms 'sale,' 'selling,' 'sold,' 'seller,' 'buy,' 'purchase,' and 'purchaser,' shall be construed accordingly." (Emphasis supplied.)

STATEMENT OF FACTS

Respondent is a producer of crushed stone, a commodity subject to Maximum Price Regulation No. 188 and the amendment thereto. During the month of October, 1941, or just prior thereto, Respondent entered into a contract with the Seaboard Air Line Railway Company whereby it agreed to furnish the latter, on demand, crushed stone at

a price of sixty cents (60c) per ton, to be delivered when called for by the purchaser. In the latter part of January, 1942, Respondent verbally made a firm commitment to sell and deliver, on demand, to V. P. Loftis Company crushed stone at One Dollar and Fifty Cents (\$1.50) per cu. yd. The stone sold to Seaboard and the stone sold to Loftis was found first by the District Court, then by the Circuit Court of Appeals, to be substantially the same commodity or material (R. pp. 181-186 and p. 193). Indeed, the deliveries made to both Seaboard and Loftis were filled from the same piles of stone (R. 193). The orders of both purchasers were filled from the same stockpiles interchangeably. (R. p. 33.)

The contract with Loftis was confirmed in writing on February 11, 1942 (Exhibit A, R. p. 21.) On January 15, 1942, there was an actual physical delivery to Loftis of a portion of the crushed stone Respondent had committed itself to deliver on demand. Respondent proceeded in good faith to crush and stockpile the stone it had contracted to deliver to Loftis on demand and as the stone was crushed and stockpiled it was inspected and accepted by a Government inspector from the U. S. Engineers Office (R. pp. 80-81) as being the product the Respondent was committed to deliver to Loftis. On March 12, 1942 (R. p. 22) Loftis wired Respondent:

"Operations on our Stuart contract to continue.
Stop. Continue shipments on our order."

On account of having to work on the coffer-dam for approximately 30 days, Loftis could not pour concrete and did not have available storage space for crushed stone; for these reasons, he was unable to accept actual delivery of any more stone from the Respondent until after March, 1942, when Loftis could begin pouring concrete. (Exhibit D, R. p. 22:)

Solely by reason of the fact that Respondent had been advised by Loftis not to make further actual deliveries during March, 1942, the only actual deliveries made during the month of March of the same commodity was to Seaboard for the purpose of partial completion of the pre-existing contract entered into in October, 1941.

The Courts below found upon substantial evidence that Loftis and Seaboard were purchasers of the same class.

Under the contract with Loftis there were two classes of stone (Exhibit A), (R. p. 20); Class A stone and Class B stone, the two classes differing only as to size and having the same market price of One Dollar and Fifty Cents (\$1.50) per cu. yd. (There is no appreciable difference between a cubic yard of crushed stone and a ton of the same material, as stated by the Circuit Court.) (R. p. 193.) The Class B stone, under the Loftis contract, was the same commodity sold to the Seaboard and was used interchangeably. (R. p. 84.)

By another contract, between October 8, 1942, and December 15, 1942, Respondent sold and thereafter delivered to Seaboard 25,239.25 tons of crushed stone at Eighty-five Cents (85c) per ton and by another contract commencing on or about December 15, 1942, sold and thereafter delivered to the Seaboard 92,316.15 tons of crushed stone at One Dollar (\$1.00) per ton. These two last mentioned contracts and deliveries to the Seaboard are the basis of the claim of the Administrator insofar as his action is for treble damages, and likewise the basis on which he sought his injunction.

Between October, 1941, when Respondent contracted with Seaboard to deliver crushed stone at Sixty Cents (60c) per ton, and September 1, 1942, the cost of producing this stone had increased Thirty-eight Cents (38c) per ton. (R. pp. 76-77.)

The District Court dismissed the action on the grounds (1) that whatever cause of action existed to recover a judgment under Section 205 (c) of the Act was vested in the purchaser and not in the Administrator, and (2) that One Dollar and Fifty Cents (\$1.50) per ton was the highest price "charged for delivery" of this commodity in March, 1942, thereby becoming the ceiling price on this commodity, and that the price of Sixty Cents (60c) per ton for the same commodity delivered to the Seaboard in March, 1942, under a pre-existing contract was not the maximum price at which Respondent could lawfully sell that commodity, as contended by the Administrator.

The Price Administrator appealed. The Circuit Court of Appeals disagreed with the District Court with respect to who had the right to maintain the action, holding that the Administrator and not the buyer had such right, but affirmed the District Court in its holding that One Dollar and Fifty Cents (\$1.50) per ton was Respondent's ceiling price for the commodity involved, as shown by the proper interpretation of the statute and pertinent regulations.

The case is now before this Court on a writ of certiorari.

ARGUMENT

The District Court and the Circuit Court below have found the facts in this case. Unless such facts are clearly erroneous, the findings will not be disturbed on review.

Rule 52, U. S. C. A., Title 28, page 677.

The Plain intendment of the Statutes and Regulations is to fix as the maximum price the price for which an article of commerce was bought and sold in legitimate trading in the due course of business during March, 1942.

The Administrator contends that the maximum price is fixed only by actual deliveries made during March, 1942.

In so doing, he ignores all requirements of the Regulation and gives force and effect only to the word "delivered."

Section 1499, 153(a) reads as follows:

"Articles Priced in March, 1942. The maximum price for an article which was delivered or offered for delivery in March, 1942, by the manufacturer shall be the highest price charged by the manufacturer during March, 1942 (as defined in Section 1499,163), for the article." (Emphasis supplied.)

Section 1499.163(a) (2) reads as follows:

"1. The highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March, 1942; or

"2. If the seller made no such delivery during March, 1942, such seller's highest offering price to a purchaser of the same class for delivery of the article or the material during that month."

Obviously, there must be *both a charge and a delivery* during March, 1942, to fix a ceiling price. If, however, there was not *both a charge and a delivery*, the maximum price would be the highest offering price.

It is clear that the Regulation, when it says "If no charge was made for the same commodity," means that if no such charge was made in March, 1942. On the contrary, such charge as was made for the material sold by the Respondent was made when it entered into its contract with *Seaboard Air Line Railway* in October of 1941. Obviously, as to that contract, there was no *charge or sale* in March, 1942, and, under the Regulation properly construed or interpreted *both a sale and a delivery* in March, 1942, are essential to the fixing of a ceiling price.

In the case of *Brown v. Mars*, 135 F. 2d, 843, on page 856, in the opinion of the Circuit Court of Appeals for the 8th Circuit, it is said:

"The Regulation establishing the March base prescribed the highest price *charged* by the seller during

March, 1942," to apply to commodities "delivered * * * during March, 1942." Delivered during March, 1942, was defined as being if during such month it was received by the purchaser or by any carrier * * * for shipment to the purchaser." General Maximum Price Regulation, Section 20(d). Thus, the test is a *sale and delivery* to the purchaser or to a carrier for him during March." (Emphasis supplied.)

Petitioner devotes a considerable portion of his Brief to the proposition that the method of pricing was to freeze all prices at the level of the highest prices charged by each seller in March, 1942. The emphasis placed upon the Regulation throughout should be upon the word "charged," whereas the Administrator seeks to place it upon the word "delivered." In spite of the words "charged for delivery" which appear repeatedly in the Regulation and the subdivisions thereof, the Administrator apparently seeks to substitute for these words in his own Regulation the words "charged for a product which was delivered" regardless of the time when the sale was made. Carried to its logical conclusion, the contention of the Administrator would defeat his oft-declared purpose to fix prices as of March, 1942.

The placing of so much emphasis upon the word "delivered" and ignoring the phrase "highest price charged during March, 1942," leads the Administrator to an illogical construction of the Regulation. In fact, the clause, "highest price charged during March, 1942," loses its meaning entirely if it is to be read out of the Regulation. The Administrator himself has always contended that the core of the Regulation is its requirement that each seller charge no more than the prices which were charged during March, 1942.

The deliveries made by Respondent which were made during March, 1942, for which it received a lower price than its highest offering price as found by the District Court

and the Circuit Court of Appeals below, were made pursuant to a contract made in October, 1941. This contract called for delivery over a period of months including March, 1942. The transactions or actual sales took place in October, 1941, and are therefore to be disregarded.

The only reasonable construction which can be given to the Regulation is that *both* the charge and the delivery must have occurred during March, 1942, in order to fix the maximum prices. It follows that *both* a sale and a delivery pursuant thereto must have occurred during March, 1942. Any other construction renders meaningless the clause "highest price charged during March, 1942."

In this connection sight should not be lost of the definition contained in Section 302 of the Emergency Price Control Act of 1942 (U.S.C.A. Title 50, APP 942), reading as follows:

"(a) The term 'sale' includes sales, dispositions, exchanges, leases and other transfers, and contracts or offers to do any of the foregoing. The term 'sell,' 'selling,' 'seller,' 'buy,' and 'buyer' shall be construed accordingly."

To substantially the same effect is the promulgation of the Administrator himself. (See quotation from 1499.20 (r) *supra*.)

It will thus be seen that *both* Congress and the Administrator placed *sales* and *offers for sale* on the *same* basis and in neither of the definitions was a delivery required or, for that matter, even mentioned.

Since, according to the record, Respondent made no deliveries during March, 1942, other than deliveries made to the Seaboard Air Line Railway Company under the pre-existing contract of October, 1941, it follows that the ceiling price of the Respondent became its highest offering price for delivery of the same product. This the Courts below arrived at by taking the price which was the Respon-

dent's highest current offering price prevailing during March, 1942, because of the fact that the Respondent had made a firm commitment to deliver at the price during March, had on hand the product for delivery which it had constructively delivered by its having been inspected, passed and actually ordered to be delivered when circumstances beyond Respondent's control prevented actual physical delivery during the base period. The Courts below properly held that such circumstances preventing actual delivery should not be allowed to affect Respondent's ceiling price and interpreted the Act and the Regulation accordingly. Not only is this true in the case at bar but the Emergency Court of Appeals, considering the validity of a similar regulation, has said that such fortuitous circumstances should not affect the rights of the parties.

In the case of *Montgomery Ward & Co., Inc. v. Chester Bowles, Price Administrator*, decided February 12, 1945, and unpublished, Judge Laws, speaking for the Emergency Court of Appeals in declaring a Regulation of the Administrator invalid, has the following to say:

"The discrimination is obvious and was brought about not by reason of any scientific approach to price control but by what may have been a turn of the wheel of chance. Failure of a merchant to deliver in March, 1942, from his highest price line might have occurred because of weather conditions in his location; because the style of garments which he handled in his highest price line during that month chanced not to meet with favor; because he was temporarily out of stock in his highest price line; because of inadequate advertisement or displays; or any number of other misfortunes. We may not assume that failure to make a delivery in a price line for such reasons would, in the normal course of events, result in his abandonment of the price line; certainly in many cases it would not. Nevertheless, the Regulation forced such abandonment, while at the same time more fortunate merchants in the nation suffered

no such results in the conduct of their businesses. * * * For these reasons, we think Maximum Price Regulation No. 330, before the issuance of Supplementary Order No. 93, was invalid in its application to merchants who, because of their failure to make a delivery of garments during March, 1942, were denied the right to make future sales of garments in a category in price lines which they were actually engaged in selling during March, 1942, or in price lines below the highest price lines which they were actually engaged in selling in that category during March, 1942."

It is apparent from the record in this case (R. p. 42) that the actual production cost to Respondent of material, the sale of which was complained of in the case at bar, was 92c per ton. Therefore, the construction of this Regulation contended for by the Administrator would effectively stop any sales of this product by the Respondent. The Courts below, seeing the inequity and unfairness of this situation, interpreted the Regulation so as to give effect to the meaning of the Act, as they had a right to do and as it was their duty to do.

Stewart v. Kahn, 11 Wall. 493, 20 L. Ed. 176.

In the case at bar the Courts below recognized the validity of the Regulation and construed and applied its provisions in a manner consistent with its validity. (R. p. 194.)

Yakus v. United States, 321 U. S. 414.

As the Circuit Court of Appeals, in its opinion below, said:

"Moreover, since this Court has no jurisdiction to consider the validity or invalidity of these particular regulations, we must accept and apply them in a manner consistent with their validity."

Bowles v. Seminole Rock & Sand Co., 145 F. 2d. 482.

Proper construction of statutes involves conclusions which lie beyond the direct expression of the text.

United States v. Farenholt, 206 U. S. 226, 51 L. Ed. 1036.

"Statutes should receive a sensible construction such as will effectuate the legislative intention and, if possible, so as to avoid an unjust and absurd conclusion."

In re: Chapman, 166 U. S. 661, 41 L. Ed. 1154.

"General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. *It will always, therefore, be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.*" (Emphasis supplied.)

United States v. Kirby, 7 Wall. 482, 19 L. Ed. 278.

The price found by the Courts below to be the ceiling price was fixed upon the basis of Respondent's highest offering price in March, 1942, and is buttressed by the fact that it was the prevailing price during the base period in Dade County, Florida, in which Respondent's business was located. (R. p. 38.)

In the case at bar the Court of Appeals has the following to say, citing *Yakus v. U. S.*:

"The plain intentment of the statutes and regulations by means of which prices were frozen was to fix those prices indiscriminately at the highest price for which an article of commerce was bought and sold in legitimate trading in the due course of business during March, 1942. The Act requires that the prices established must be fair and equitable and in fixing them the Administrator is directed to give due consideration so far as practicable to prevailing prices during the designated base period." (Emphasis supplied.)

Yakus v. United States (Supra).

Not only has the Circuit Court in the case at bar concluded that a delivery made under a pre-existing contract is not the controlling factor in fixing the ceiling price but precisely the same conclusion was reached in the case of *Bowles v. Good Luck Glove Company*, 52 Fed. Supplement 942 (D. C. Illinois). Actually the Circuit Court of the 7th Circuit has not finally acted upon the judgment of the District Court in the *Good Luck Glove Company* case, as appears in the Petitioner's application for writ of certiorari, but the Circuit Court of Appeals of the 7th Circuit did say that the District Court had filed an opinion with which the Circuit Court was in accord and Petitioner has treated the language of the Circuit Court in its opinion as the decision of that Court.

Bowles v. Good Luck Glove Co., 143 Fed. 2d, 579.

Considering the opinion by the Circuit Court of Appeals as a final adjudication on the merits of the issues involved, it is apparent that the decision in the *Good Luck Glove* case and the case at bar agree entirely to the effect that a delivery under a pre-existing contract is not controlling. In the *Good Luck Glove Company* case it was the contention of the Administrator, as it is here, that ceiling prices for the specific commodity had been fixed by reason of actual deliveries made during March, 1942, which were made in partial compliance with a pre-existing contract. The Court held that the prices upon which the Company had become committed some months before were not the maximum prices because such prices were not the current prevailing prices during the base period of March, 1942, and that it was not the intention of the Congress and the Administrator to fix the ceiling as of March, 1942, at the price fixed by outstanding contracts ante-dating March, 1942, by several months. The Court in the case at bar arrived at precisely the same conclusion.

The Courts below properly considered rules of construction for the statutes and gave to the statute and to the Regulation its real meaning with a view towards accomplishing the purpose of the Act and properly concluded upon ample evidence that the established ceiling price was One Dollar and Fifty Cents (\$1.50) per ton.

The interpretations which the Administrator contends were given to the Act are neither binding upon Defendant nor conclusive upon the Court.

In *Davies Warehouse Company v. Bowles*, Price Administrator, 321 U. S. 144, 64 Sup. Ct. Rep. 474, the proceeding was to set aside a supplementary regulation and amendment to the General Maximum Price Regulation. On the question here under discussion, the Supreme Court says:

"Lastly, it is contended that we should accept the Administrator's view in deference to Administrator's construction. The Administrator's ruling in this case was no sooner made than challenged. We cannot be certain how far it was determined by the considerations advanced, mistakenly as we think, in its defense in this case. It has hardly seasoned or broadened into a settled administrative practice. If Congress had deemed it necessary or even appropriate that the Administrator's order should in effect be final in construing the scope of the national price-fixing policy, it would have not been at a loss for words to say so. We do not think it should outweigh the considerations we have set forth as to the proper construction of the statutes."

In *Walling v. Swift & Co.*, 131 Fed. (2d), 249 (7th Circuit), the Court said, at page 252:

"We have given consideration to the fact that this is an administrative interpretation of the Act promulgated by the Department, but we do not think it has determinative influence. It must be remembered that this interpretation of the Department is new and af-

fords the very basis of this controversy, in the making of which the Defendant has challenged this ruling at its first opportunity. In our opinion, for such a ruling to prove persuasive, it should have been settled and acted upon by the Department and acquiesced in by those affected thereby for such time as would lead one to believe that because of the acceptance of this interpretation it had gained some sanction."

"See also to the same effect: *W. P. Brown & Sons Lumber Co. v. L. & N. Railroad Co.*, 299 U. S. 393, 57 Sup. Ct. Rep. 265; *Ft. Worth & Denver City Railway Co. v. Childress Cotton Oil Co.*, 48 Fed. Supp. 937; *Sandford's Estate v. Commissioner of Internal Revenue*, 308 U. S. 39, 60 Sup. Ct. Rep. 51, 60, and *Nagle v. O'Connor*, 88 Fed. (2d), 936, 939."

The Interpretations of the Administrator Are Inconsistent

Not only have the interpretations sought to be placed upon the Regulation and Act itself by the Administrator been inconsistent with the Act and the Regulation, but, in fact, the various interpretations have been inconsistent one with another. In his Brief the Petitioner states

"the settled administrative construction has followed the plain meaning of the Regulation."

Reference is made to a bulletin entitled, "What Every Retailer Should Know." The reference itself would appear to apply only to retailers and wholesalers and to have no application to a manufacturer such as Respondent was.

Thereafter, on August 20, 1942, the Administrator stated:

O.P.A. 564, *supra*.

"However, if after the general price increase the seller delivered to a class of purchaser only at a lower price, the lower price is the maximum price *unless the delivery was made under a contract.*" (Emphasis supplied.)

Subsequently, on December 5, 1942, by O.P.A. Press Release No. 1223, the Administrator says:

"The effect is to allow one who last March delivered at prices established by a *contract signed many months before* and who raised his prices generally before April 1st, to bring his prices on the expiration of the contract in line with the increased prices he was *charging* in March. *March is the base period under the two Regulations.*" (Emphasis supplied.)

It should be noted that both of the quoted statements, which relate to pre-existing contracts, were made after the so-called "Interpretations" relied upon by the Petitioner.

Not only is the interpretation now contended for by the Administrator inconsistent with the interpretations issued in the foregoing press releases, but it is likewise altogether inconsistent with both the language of the *Emergency Price Control Act of 1942* and with the language of the Regulation of the Administrator issued thereunder. In Section 302 of the Emergency Price Control Act of 1942 the language is:

"a. The term 'sale' includes sales, dispositions, exchanges, leases, and other transactions, and *contracts and offers to do any of the foregoing*. The term 'sale,' 'selling,' 'seller,' 'buy' and 'buyer' shall be construed accordingly." (Emphasis supplied.)

Substantially the same language as appears in the Act likewise appears in subdivision (r) of General Maximum Price Regulation 1499.20, quoted *supra*.

As said before in this Brief, the interpretation sought by the Administrator disregards the word *sale* and seeks to make the word *delivery* the sole criterion. If an *offer to sell* is a sale, obviously a delivery would not be required to accomplish a sale under the terms of the Act or the Regulation.

Administrator Bowles makes the contention that his interpretation of the language of the Regulation should be

controlling because issued by him and construed by him in the so-called "Interpretations" appearing in Petitioner's Brief. As a matter of fact, the language of the Regulation is the language of the Administrator's predecessor and, if the interpretations had the sanction of an Administrator, it must have been the interpretation of a former Administrator, not of Petitioner.

On the contrary, the construction placed by the Courts below upon the Regulation is consistent with the language of the Act, with the language of the Regulation, and with the last press release issued by the Administrator by way of construction.

In construing his own Regulation, the Administrator could have worded both the Regulation and the construction in any way that he pleased, and asserted, as he does, that such Regulation and construction or interpretation was binding upon the Court. *If this be true, it is difficult to ascertain what, if any, function would be left to the Courts under the Act.*

The Courts Below Did Not Invade the Jurisdiction of the Emergency Court of Appeals

In Petitioner's Brief it is contended that the Courts below, particularly the Circuit Court of Appeals, invaded the jurisdiction of the Emergency Court of Appeals. There is no merit in any such contention.

It clearly appears from the decision itself (145 F. (2d), 482-5) that the Circuit Court of Appeals recognized its lack of jurisdiction to consider the validity of the Regulation and specifically so stated in the following language:

"The validity of this Regulation is not questioned . . ."

And:

"Moreover, since this Court has no jurisdiction to consider the validity or invalidity of these particular

Regulations, we must accept and apply them in a manner consistent with their validity."

The Court did properly interpret the Regulation which it not only had the jurisdiction but the duty to do when the question of its interpretation was presented to it, and the power of the Court to interpret the Regulation is not only clearly recognized by the Court but has been insisted upon by the Administrator himself, as will appear from the language of the Court in the case of *Marlene Linens v. Bowles*, 144 Fed. (2d), 874, as follows:

"The primary contention of the complainant is that the interpretation placed upon the Regulation by the Administrator's . . . office was wrong. The Administrator urges that this is the sole issue which Complainant seeks to raise and that in the absence of an attack upon the validity of the Regulation, such a question is not cognizable in this Court (U. S. Emergency Court of Appeals) he (Administrator) suggests that in an appropriate Court the Complainant may obtain a declaratory judgment as to the interpretation and applicability of the Regulation. He (Administrator) also suggests that in an enforcement proceeding against it for an alleged violation of the Regulation, the Complainant may defend on the ground that the Administrator's interpretation is erroneous and that the Regulation is inapplicable to it. We (the Court) agree that if the Complainant merely sought an interpretation of the Regulation, without in any way attacking the validity, it would not be cognizable by this Court." (Words in parenthesis added.)

It thus appears that not only has the Administrator never questioned the right and duty of a District Court or a Court of Appeals to interpret a Regulation but that he has insisted that such Courts alone have the right so to do and that the Emergency Court of Appeals is altogether without jurisdiction so to do.

The Courts below properly acted upon the assumption that the Administrator in promulgating the Regulation sought to comply with the provisions of the Act and gave to the action of the Administrator, in promulgating the Regulation, an interpretation which was consonant with the Act and with the declared purpose of the Administrator to make the month of March, 1942, the base period.

The Interpretation of the Regulation by the Courts Below Promote and Support the Stabilization Program

In Petitioner's Brief there has been injected a contention that the stabilization program may be unsettled in the event the decision of the Courts below be affirmed. In support of that contention, Petitioner has at considerable length asserted, though without support in the record, that there are forty-seven regulations similar to Price Regulation 188 affecting numerous commodities; that is to say that all of said commodities have had their ceiling price fixed and determined by using the month of March, 1942, as the base period. Such a contention is unsound and contrary to logical reasoning.

In the first place, another factual situation identical with that of the case at bar is not only most improbable, but so remote that there is practically no chance whatsoever of this decision having the slightest effect upon any of the ceiling prices heretofore established pursuant to the Act and Regulation.

Even if the decision in this case might have any effect whatsoever on the stabilization program, what will that effect be?

If the construction contended for by the Administrator should be adopted, it would serve to defeat the Administrator's declared purpose to preserve, insofar as practicable, the current price relationship existing during the base period of the month of March, 1942; and this for the reason that

if the ceiling prices are to be determined solely upon the basis of actual deliveries made pursuant to contracts entered into in October, 1941, in utter disregard of current prices prevailing during the base period of March, 1942, the result would of necessity be that the current prices of the base period of March, 1942, would be disregarded and in place thereof the ceiling prices would be fixed on the current prevailing price in the month of October, 1941. Correspondingly, although the Administrator says that a month is the maximum base period, the length of the base period would by such construction be increased to run from October, 1941, to March, 1942, both inclusive.

If, upon the contrary, the ruling of the Courts below be affirmed, the only result that can follow is that the current prevailing price during the month of March, 1942, will be *preserved* as fixing the maximum price. If any contention of the Administrator stands out in the record, it is that the month of March, 1942, and that month alone, must be the base period.

Or, in the language of the Circuit Court of Appeals in the case at bar:

"The plain intentment of the statutes and regulations by means of which prices were frozen was to fix those prices indiscriminately at the highest price for which an article of commerce was bought and sold in legitimate trading in the due course of business during March, 1942. The Act requires that the 'prices established must be fair and equitable, and in fixing them the Administrator is directed to give due consideration, so far as practicable, to prevailing prices during the designated base period.'"

(Citing *Yakus v. U. S.*, *supra*.)

CONCLUSION

In conclusion, it is respectfully submitted that the Courts below fully understood when they were interpreting the

Regulation involved that, insofar as this action by the Administrator is concerned, that portion of the action which involves treble damages is an action for a penalty. The compulsory payment of an arbitrary sum fixed by the Congress which is not intended to recoup a loss or damage which is personal in its nature, but, which on the other hand, is intended to punish as a deterrent, is a penalty.

Hunington v. Attrill, 146 U. S. 657, 36 L. Ed. 1123.

In fact an action under Section 205(e), *the precise Section relied upon here by petitioner*, was held by the Circuit Court of Appeals, 6th Circuit, on February 16, 1945, to be an action for a penalty.

Bowles v. Farmers National Bank of Lebanon, Ky.,
147 F. 2d, 425.

Equity abhors a penalty and the Respondent is therefore entitled to the benefit of such interpretation both of the Act and of the Regulation as will avoid the penalty.

Let us see where the literal interpretation of "actual delivery" would lead us in the case at bar. Respondent was under obligation to deliver the identical material when called for at a price of \$1.50 per ton throughout the entire month of March, 1942 (R. p. 31); and had for that purpose placed the material in stockpiles (R. p. 32) ear-marked as special stockpiles for the purpose of having engineering tests made for such deliveries and delivering therefrom to the purchaser (R. p. 32). These tests were made promptly by the Government Inspector and the product promptly accepted for shipment. Shipments were made both before and after March, 1942 (R. p. 32), and yet merely because there chanced to be no actual delivery, the Administrator contends that Respondent should be required to sell its product at 32c per ton below actual cost of production.

The Courts below refused to accept such an unreasonable, inequitable and strained construction of the Act and Regulation. On the contrary, the Courts below followed that cardinal rule of construction which holds that due regard should be had for the general purpose and object of the Statute and Regulation, when taken as a whole. By thus keeping in mind the general purpose and design they arrived at and announced a fair, reasonable and correct interpretation.

It is, therefore, respectfully submitted that the Judgment of the Circuit Court of Appeals should be affirmed.

ROBERT RUARK, Raleigh, N. C.

BENNETT H. PERRY, Henderson, N. C.

ROBERT H. ANDERSON, Miami, Florida

J. M. HEMPHILL, Chester, S. C.

SAMUEL W. RUARK, Raleigh, N. C.

Attorneys for Respondent.



SUPREME COURT OF THE UNITED STATES.

No. 914.—OCTOBER TERM, 1944.

Chester Bowles, Administrator, Of-
fice of Price Administration, Pe-
titioner,

vs.

Seminole Rock & Sand Company.

On Writ of Certiorari to
the United States Circuit
Court of Appeals for the
Fifth Circuit.

[June 4, 1945.]

Mr. Justice MURPHY delivered the opinion of the Court.

Our consideration here is directed to the proper interpretation and application of certain provisions of Maximum Price Regulation No. 188,¹ issued by the Administrator of the Office of Price Administration under Section 2(a) of the Emergency Price Control Act of 1942.²

Respondent is a manufacturer of crushed stone, a commodity subject to Maximum Price Regulation No. 188. In October, 1941, respondent contracted to furnish the Seaboard Air Line Railway crushed stone on demand at 60 cents per ton, to be delivered when called for by Seaboard. This stone was actually delivered to Seaboard in March, 1942.

In January, 1942, respondent had contracted to sell crushed stone to V. P. Loftis Co., a government contractor engaged in the construction of a government dam, for \$1.50 a ton.³ This stone was to be delivered by respondent by barge when needed at the dam site. A small portion of stone of a different grade than that sold to Seaboard was delivered to Loftis Co. during January pursuant to this contract. For some time thereafter, however, Loftis Co. was unable to pour concrete or to store crushed stone at the dam site. Respondent thus made no further deliveries under this contract until August, 1942, at which time stone of the same grade as received by Seaboard was delivered to Loftis Co. at the \$1.50 rate.

¹ 7 Fed. Reg. 5872, 7967, 8943.

² 56 Stat. 23, 24.

³ The contract actually spoke in terms of \$1.50 per cubic yard, but there is no appreciable difference between a cubic yard of crushed stone and a ton of crushed stone.

Subsequently, and after the effective date of Maximum Price Regulation No. 188, respondent made new contracts to sell crushed stone to Seaboard at 85 cents and \$1.00 per ton. Alleging that the highest price at which respondent could lawfully sell crushed stone of the kind sold to Seaboard was 60 cents a ton, since that was asserted to be the highest price charged by respondent during the crucial month of March, 1942, the Administrator of the Office of Price Administration brought this action to enjoin respondent from violating the Act and Maximum Price Regulation No. 188.⁴ The District Court dismissed the action on the ground that \$1.50 a ton was the highest price charged by respondent during March, 1942, and that this ceiling price had not been exceeded. The Fifth Circuit Court of Appeals affirmed the judgment. 145 F. 2d 482. We granted certiorari because of the importance of the problem in the administration of the emergency price control and stabilization laws.

In his efforts to combat war time inflation, the Administrator originally adopted a policy of piecemeal price control, only certain specified articles being subject to price regulation. On April 28, 1942, however, he issued the General Maximum Price Regulation.⁵ This brought the entire economy of the nation under price control with certain minor exceptions. The core of the regulation was the requirement that each seller shall charge no more than the prices which he charged during the selected base period of March 1 to 31, 1942. While still applying this general price "freeze" as of March, 1942, numerous specialized regulations relating to particular groups of commodities subsequently have made certain refinements and modifications of the general regulation. Maximum Price Regulation No. 188, covering specified building materials and consumers' goods, is of this number.

⁴ The Administrator also sought to recover from respondent a judgment under Section 205(e) of the Act for three times the amount by which the sales price of the crushed stone sold by the respondent to Seaboard after the effective date of Maximum Price Regulation No. 188 exceeded 60 cents per ton. The District Court held that the purchaser rather than the Administrator was vested with whatever cause of action existed to recover a judgment under Section 205(e). The Circuit Court of Appeals, however, held that Section 205(e), as amended by Section 108(b) of the Stabilization Extension Act of 1944, 58 Stat. 640, entitled the Administrator rather than the purchaser to bring suit under the circumstances of this case. This aspect of the case is not now before us.

⁵ 7 Fed. Reg. 3156.

The problem in this case is to determine the highest price respondent charged for crushed stone during March, 1942, within the meaning of Maximum Price Regulation No. 188. Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. The legality of the result reached by this process, of course, is quite a different matter. In this case the only problem is to discover the meaning of certain portions of Maximum Price Regulation No. 188. Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator.

Section 1499.153(a) of Maximum Price Regulation No. 188 provides that "the maximum price for any article which was delivered or offered for delivery in March, 1942, by the manufacturer, shall be the highest price charged by the manufacturer during March, 1942 (as defined in § 1499.163) for the article." Section 1499.163(a)(2)⁶ in turn provides that for purposes of this regulation the term:

"'Highest price charged during March, 1942' means

"(i) The highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March, 1942; or

"(ii) If the seller made no such delivery during March, 1942, such seller's highest offering price to a purchaser of the same class for delivery of the article or material during that month; or

"(iii) If the seller made no such delivery and had no such offering price to a purchaser of the same class during March, 1942, the highest price charged by the seller during March, 1942, to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers; . . ."

It is thus evident that the regulation establishes three mutually exclusive rules for determining the highest price charged by a seller during March, 1942. The facts of each case must first be tested by rule (i); only if that rule is inapplicable may rule (ii)

⁶ 7 Fed. Reg. 7968-7969.

be utilized; and only if both rules (i) and (ii) are inapplicable is rule (iii) controlling.

The dispute in this instance centers about the meaning and applicability of rule (i). The Administrator claims that the rule is satisfied and therefore is controlling whenever there has been an actual delivery of articles in the month of March, 1942, such as occurred when respondent delivered the crushed rock to Seaboard at the 60-cent rate. The respondent, on the other hand, argues that there must be both a charge and a delivery during March, 1942, in order to fix the ceiling price according to rule (i). Since the charge or sale to Seaboard occurred several months prior to March, it is asserted that rule (i) becomes inapplicable and that rule (ii) must be used. Inasmuch as there was an outstanding offering price of \$1.50 per ton for delivery of crushed stone to Loftis Co. during the month of March, 1942, although the stone was not actually delivered at that time, respondent concludes that the requirements of rule (ii) have been met and that the ceiling price is \$1.50 per ton.

As we read the regulation, however, rule (i) clearly applies to the facts of this case, making 60 cents per ton the ceiling price for respondent's crushed stone. The regulation recognizes the fact that more than one meaning may be attached to the phrase "highest price charged during March, 1942." The phrase might be construed to mean only the actual charges or sales made during March, regardless of the delivery dates. Or it might refer only to the charges made for actual delivery in March. Whatever may be the variety of meanings, however, rule (i) adopts the highest price which the seller "charged . . . for delivery" of an article during March, 1942. The essential element bringing the rule into operation is thus the fact of delivery during March. If delivery occurs during that period the highest price charged for such delivery becomes the ceiling price. Nothing is said concerning the time when the charge or sale⁷ giving rise to the

⁷ Respondent points to the provision in Section 302(a) of the Act, 56 Stat. 36, to the effect that the term "sale" as used in the Act includes "sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing," as well as to a similar provision in Section 1499.20(e) of the General Maximum Price Regulation. But such a definition is of no assistance in determining the meaning of the Administrator's use of the phrase "charged . . . for delivery" during March, 1942.

delivery occurs. One may make a sale or charge in October relative to an article which is actually delivered in March and still be said to have "charged . . . for delivery . . . during March." We can only conclude, therefore, that for purposes of rule (i) the highest price charged for an article delivered during March, 1942, is the seller's ceiling price regardless of the time when the sale or charge was made.

This conclusion is further borne out by the fact that rule (ii) becomes applicable only where "the seller made no such delivery during March, 1942," as contemplated by rule (i). The absence of a delivery, rather than the absence of both a charge and a delivery during March, is necessary to make rule (i) ineffective, thereby indicating that the factor of delivery is the essence of rule (i). It is apparent, moreover, that the delivery must be an actual instead of a constructive one. Section 1499.20(d) of General Maximum Price Regulation, incorporated by reference into Maximum Price Regulation No. 188 by Section 1499.151, defines the word "delivered" as meaning "received by the purchaser or by any carrier . . . for shipment to the purchaser" during March, 1942. Thus an article is not "delivered" to a purchaser during March because of the existence of an executory contract under which no shipments are actually made to him during that month. In short, the Administrator in rule (i) was concerned with what actually was delivered, not with what might have been delivered.

Any doubts concerning this interpretation of rule (i) are removed by reference to the administrative construction of this method of computing the ceiling price. Thus in a bulletin issued by the Administrator concurrently with the General Maximum Price Regulation entitled "What Every Retailer Should Know About the General Maximum Price Regulation,"⁸ which was made available to manufacturers as well as to wholesalers and retailers, the Administrator stated (p. 3): "The highest price charged during March 1942 means the highest price which the retailer charged for an article *actually delivered* during that month or, if he did not make any delivery of that article during March,

⁸ General Maximum Price Regulation, Bulletin No. 2 (May, 1942). Maximum Price Regulation No. 188 established prices "at the identical level of the General Maximum Price Regulation" for articles dealt in during March, 1942. 7 Fed. Reg. 5873.

then his *highest offering price* for delivery of that article during March." He also stated (p. 4) that "It should be carefully noted that *actual delivery* during March, rather than the making of a sale during March, is controlling." In his First Quarterly Report to Congress, the Administrator further remarked (p. 40) that "'Highest price charged' means one of two things: (1) It means the top price for which an article was delivered during March 1942, in completion of a sale to a purchaser of the same class . . . (2) If there was no actual delivery of a particular article during March, the seller may establish as his maximum price the highest price at which he offered the article for sale during that month." Finally, the Administrator has stated that this position has uniformly been taken by the Office of Price Administration in the countless explanations and interpretations given to inquirers affected by this type of maximum price determination.

Our reading of the language of Section 1499.163(a)(2) of Maximum Price Regulation No. 188 and the consistent administrative interpretation⁹ of the phrase "highest price charged during March, 1942" thus compel the conclusion that respondent's highest price charged during March for crushed stone was 60 cents per ton, since that was the highest price charged for stone actually delivered during that month. The two courts below erred in their interpretation of this regulation and the judgment below must accordingly be reversed.

⁹ Respondent points to two allegedly inconsistent interpretations made by the Administrator:

1. On August 20, 1942 (O. P. A. Press Release No. 564), he made certain statements with reference to Amendment 23 to the General Maximum Price Regulation, 7 Fed. Reg. 6615, allowing a different method of maximum price computation where general price increases were announced prior to April 1, 1942, and deliveries at lower prices were made in March under previous contracts. The provisions and applicability of this amendment are not in issue in this case and statements interpreting that amendment have no bearing here.

2. On December 5, 1942 (O. P. A. Press Release No. 1223), he issued a statement interpreting Amendment 38 to the General Maximum Price Regulation and Amendment 3 to Maximum Price Regulation No. 188, 7 Fed. Reg. 10155. These amendments authorized sellers who made general price increases prior to April 1, 1942, to apply the increases to ceiling prices for goods and services delivered during March under long-term contracts. The Administrator's explanation of these amendments, which are not presently before us, is likewise irrelevant in this case.

Indeed, the fact that the Administrator found it necessary to make such amendments is some evidence that under the rules here in issue the price established under a previous contract is the maximum price if that was the highest price for goods actually delivered during March, 1942.

We do not, of course, reach any question here as to the constitutionality or statutory validity of the regulation as we have construed it, matters that must in the first instance be presented to the Emergency Court of Appeals. *Lockerty v. Phillips*, 319 U. S. 182; *Yakus v. United States*, 321 U. S. 414, 427-431. Nor are we here concerned with any possible hardship that the enforcement of the 60-cent price ceiling may impose on respondent. Adequate avenues for relief from hardship are open to respondent through the provisions of Section 2(c) of the Act and Section 1499.161 of the regulation.

Reversed.

Mr. Justice ROBERTS thinks the judgment should be affirmed for the reasons given in the opinion of the Circuit Court of Appeals, 145 F. 2d 482.